Supreme Court, U. S.
FILED
AUG 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-404

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

Petition for writ of certiorari filed September 10, 1979
Certiorari granted June 9, 1980

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No. 086

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF,

v

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA,
DEFENDANTS.

RELEVANT DOCKET ENTRIES

1. 02-01-77 (ALL) File complaint (INS)
2. 02-01-77 File Affid. for Bail on Detent. of Witns.: Migual Mondragon-Rubio; Alberto Alvarado-Martinez; Evadio Escamilla-Aguilar; Fidel Ruiz-Mora; Alfredo Alvarado-Martinez and Francisco Javier Baltazar-Baltazar.

— 02-02-77 DKT. ENTRY (RTT): Upon questioning of the alleged material witnesses, the Magistrate finds that they are not citizens of the United States. Court to appoint counsel. Each material witness committed to Pima Count Jail in lieu of $500.00 bond.

3. 02-02-77 File order app/c for deft. CORTEZ, Bruce F. Rinaldi
4. 02-02-77 File order app/c for deft. HERNANDEZ, Bernardo Velasco.
5. 02-03-77 File order app/c for Mat. Witnesses, Brian Edward Smith.

— DKT ENTRY (RTT): Deft. CORTEZ present with counsel pursuant to defendant's motion for reduction of bond. The Magistrate orders that bond be reduced to $1,000 Pers. App. Bond.

6. 02-08-77 File deft. CORTEZ'S $1,000 Pers. App. Bond & ord. spec. conditions of release.
7. 02-15-77 INDICTMENT (6 Cts) as to each deft.
8. 02-17-77 Notice of Setting of Case for Arr. as to deft. CORTEZ set for 2/22/77 at 2:30 p.m.

— 02-22-77 MINUTE ENTRY (RTT): On for Arr. Ea. deft. pres. w/c. Ea. deft. arr., states T/N same. Deft. CORTEZ PNG to Cts. 1 thru 6 of indict. Order cont. for trial to Thurs., Mar. 31, 1977 at 9:00 a.m. before Judge Murphy. Fur. Order ea. deft. granted 10 days to file motions.

9. 02-25-77 File Stipulation as to deft. CORTEZ re: conditions of release.
10. 02-25-77 Enter Order modifying deft. CORTEZ's conditions of release. (RTT) (Copies to AUSA, USM, USPO, RINALDI)
11. 03-02-77 Deft. HERNANDEZ's Motion to Suppress and Notice of Hearing set for 3/21/77 at 9:00 a.m.

— 03-03-77 MINUTE ENTRY (Judge Murphy): IT IS ORDERED that the hearing date previously set for the Motion to Suppress on 3/21/77 as to deft. HERNANDEZ is vacated and reset for hearing on Monday, 3/28/77 at 9:00 a.m. (Copies to BRUCE RINALDI, FPD, AUSA)

12. 03-07-77 Deft. CORTEZ's Joinder in Motion to Suppress Filed by Defendant HERNANDEZ's Motion to suppress.
13. 03-11-77 Govt's Opposition to Deft. HERNANDEZ's motion to Suppress.

— 03-28-77 MINUTE ENTRY (Judge Murphy): On for hearing on defts' Motion to Suppress. Defts. CORTEZ-HERNANDEZ Pres. w/c. Motion denied.

14. 03-28-77 List of Exhibits and Witnesses.
15. 03-31-77 List of Exhibits and Witnesses.
16. 03-31-77 Enter verdict as to deft. HERNANDEZ: GUILTY as chgd. in Cts. 1-6.

— 04-01-77 MINUTE ENTRY (Judge Murphy): On for jury trial—2nd day as to deft. CORTEZ. Deft. pres. w/c. Myron Stolle, Ct. Rptr., pres. Jury retires to deliberate at 9:00 a.m. Mistrial declared, order case cont. to Thursday, 4/14/77 at 9:00 a.m. for trial.

17. 04-01-77 Note #1 from Jury.

18. 04-01-77 Note #2 from Jury.

19. 04-01-77 Note #3 from Jury.

— 04-14-77 MINUTE ENTRY (Judge Murphy); On for jury trial re-trial. Deft. CORTEZ pres. w/c. John Davis, Ct. Rptr, pres. Jury impaneled and sworn. Rule invoked. Motion for Judgment of Acquittal denied; renewed, and and denied. Motion to strike Court's instruction re: mendacity Deft. renews motions previously made, motions denied. Jury retires to deliberate at 3:25 p.m.; returns with verdict at 4:05 p.m.: GUILTY. Order cont. for sent. to 4/29/77 at 9:00 a.m. Order deft's bond revoked. Deft. committed to custody of U.S. Marshal pending sentence.

20. 04-14-77 List of Exhibits and Witnesses.

21. 04-14-77 Enter verdict as to deft. CORTEZ: GUILT as chgd. in Cts. 1-6.

22. 04-15-77 Govt's Motion for Release of Detained Witnesses and enter Order that Miguel Mondragon-Rubio, Alberto Alvarado-Martinez, Evadio Escamilla-Aguilar, Fidel Ruiz-Mora, Alfredo Alvarado-Martinez and Francisco Javier Baltazar-Baltazar be released from custody of U.S. Marshal, there being in existence detainers for each m/w placed by Immigration and Naturalization service. (Judge Murphy) (Copies to USM, AUSA, Enriquez, FBD, Rinaldi)

— 04-26-77 MINUTE ENTRY (Judge Murphy): On for sent. Deft. HERNANDEZ pres. w/c. Judgment imposed: Cts. 1 thru 6-5 years. impr., and fine of $2,000.00 on ea. ct. Terms of impr. to run or be served conc. Fines imposed are consec. fines. Total fine $12,000.00 Deft. advised of right to appeal. No bail on appeal be set.

23. 04-26-77 Enter Judgment & Commitment as to deft. HERNANDEZ. (Judge Murphy) (Copies to USA, USM, PO, FBD, Deft.)

24. 04-26-77 Deft. HERNANDEZ'S Notice of Appeal. (Copies to USA, FPD, PO, U.S. Magistrate, CCA, Court Reporters David Lundy & Pat Vigil)

— 04-29-77 MINUTE ENTRY (Judge Murphy): On for sent. Deft. Cortez pres. w/c. Judgment imposed on Cts. 1 thru 6: 5 yrs. impr. on ea. ct. Terms of impr. imposed to run or be served conc. with each other. Deft. advised of right to appeal. Bond on appeal set in the sum of $5,000.00 surety.

25. 04-29-71 [*sic*] Enter Judgment & Commitment. (Judge Murphy) (Copies to USA, USM, PO, B. Rinaldi, Defendant)

26. 04-29-77 Deft. CORTEZ'S Notice of Appeal (Copies to USA, Bruce Rinaldi, Esq., CCA, U.S. Magistrate, PO, Court Reporters D. Lundy, M. Stolle, J. Davis & Pat Vigil)

27. 05-04-77 Deft. CORTEZ'S Petition for Bond Reduction.

28. 05-04-77 Affidavit of Attorney on Petition for Bond Reduction as to deft. CORTEZ.

29. 05-05-77 Designation of Record on Appeal as to Deft. CORTEZ. Copies issued.

30. 05-05-77 Designation of Record on Appeal as to Deft. HERNANDEZ. Copies issued.

— 05-09-77 MINUTE ENTRY (MAR): Hearing on deft's motion to reduce bond on appeal. Deft. CORTEZ pres. w/c. Hearing had. Ordered, Court takes matter under advisement.

31. 05-18-77 File Stipulation that appeal bond for Deft CORTEZ may be fixed at $5,000.00, to be secured by a property satisfactory to the U.S. Attorney.

32. 05-18-77 Enter Order that appeal bond as to Deft. CORTEZ is fined at $5,000.00 to be secured by a

property bond satisfactory to the U.S. Attorney. (MAR) (Copy to USA, Rinaldi, Financial)

33. 05-27-77 Deft. CORTEZ'S $5,000.00 Criminal Appeal Bond; approval of the Court endorsed thereon. (MAR)

34. 05-27-77 Deft. CORTEZ'S Justification on Criminal Appeal Bond.

35. 05-27-77 Copy of CCA Order for Time Schedule. (Copies to Magistrate, AUSA, FPD, David Lundy) (Deft. HERNANDEZ)

36. 06-01-77 Copy of CCA Order for Time Schedule Re Defendant CORTEZ.

No. CR 77-086-TUC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, PLAINTIFF,

v

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA,
DEFENDANTS

INDICTMENT
[8 U.S.C. § 1324(a)(2):
Transporting Aliens]
(Filed February 15, 1977)

COUNT ONE
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Miguel Mondragon-Rubio was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT TWO
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO

HERNANDEZ-LOERA knowing that a certain alien, to-wit: Alberto Alvarado-Martinez was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT III
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Evadio Escamilla-Aguilar was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT IV
[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Fidel Ruiz-Mora was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT V

[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Alfredo Alvarado-Martinez was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT VI

[18 U.S.C. 1324(a)(2)]

That on or about January 31, 1977 at or near Tucson in the District of Arizona, JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA knowing that a certain alien, to-wit: Francisco Javier Baltazar-Baltazar was in the United States of America illegally and knowing or having reason to believe that said alien's entry into the United States occurred less than three years prior thereto, transported and moved, and attempted to transport and move the said alien within the United States by means of transportation or otherwise, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

A TRUE BILL

/s/ _____

KARL BRANDT

Foreman

WILLIAM C. SMITHERMAN

United States Attorney

/s/ _____

DANIEL G. KNAUSS

Assistant United States Attorney

(9)

United States of America vs.

United States District Court for

DEFENDANT: JESUS CORTEZ-ESPINOZA

DISTRICT OF ARIZONA

DOCKET NO. CR-77-086 Tuc. (TFM)

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH April DAY 29 YEAR 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Bruce F. Rinaldi, Esq. (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of violating Title 8, United States Code, Section 1324(a)(2), transporting illegal aliens, as charged in Counts I, II, III, IV, V and VI of the Indictment filed herein.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on each of Counts I, II, III, IV, V and VI. The terms of imprisonment imposed herein shall run or be served concurrently.

SPECIAL CONDITIONS OF PROBATION

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ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

THOMAS F. HUFFMAN

4/29/77

(31)

75

(10)

United States of America vs.

United States District Court for

DEFENDANT: [ ] DISTRICT OF ARIZONA

[PEDRO HERNANDEZ-LOERA] DOCKET NO. [CR-77-086 Tuc. (TFM)]

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH April DAY 26 YEAR 1977

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL [Bernardo P. Velasco, Assistant Federal Public Defend]
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. Counts I thru VI

Defendant has been convicted as charged of the offense(s) of violating Title 8, United States Code, Section 1324(a)(2), transporting illegal aliens, as charged in the Indictment filed herein.

The Court finds that the defendant was twenty-five (25) years of age at the time of conviction and is not suitable for handling under the Federal Youth Corrections Act.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and fined the sum of Two Thousand ($2,000.00) Dollars on each of Counts I, II, III, IV, V and VI. The terms of imprisonment shall run or be served concurrently. The fines imposed herein shall be cumulative fines. The total fine to be paid is Twelve-Thousand ($12,000.00) Dollars.

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CLERK, U.S. DISTRICT COURT

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Thos F. Murphy
THOMAS F. MURPHY

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(29)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 77-086-TUC-TFM

MOTION TO SUPPRESS

UNITED STATES OF AMERICA, PLAINTIFF,

v

JESUS CORTEZ-ESPINOZA
PEDRO HERNANDEZ-LOERA,
DEFENDANTS.

Tucson, Arizona
March 28, 1977

Before the HONORABLE THOMAS F. MURPHY
United States District Judge

APPEARANCES

For the Government: James P. Mueller, Esq.
Assistant U.S. Attorney

For Defendant Cortez: Bruce Rinaldi, Esq.

For Defendant Hernandez: Bernardo Velasco, Esq.
Assistant Federal Public
Defender

Interpreter: Laura Murphy

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EXHIBITS

Government's Exhibit 1
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* * * * *

[2] THE COURT: CR-77-086, United States of America versus Jesus Cortez-Espinoza, Pedro Hernandez-Loera.

MR. VELASCO: Bernardo Velasco, on behalf of Pedro Hernandez-Loera.

MR. RINALDI: Bruce Rinaldi, appearing on behalf of Jesus Cortez-Espinoza.

MR. VELASCO: Your Honor, I filed a motion and Mr. Rinaldi joined in. The Government is not here.

THE COURT: Oh, no? Does that mean they've defaulted?

MR. VELASCO: I would think so.

THE COURT: You do? That makes it easy.

MR. RINALDI: I'll submit it on the police report.

THE COURT: I saw Sarah Bailey on the other floor.

MR. VELASCO: She's Civil.

THE COURT: You wanted to call somebody?

THE CLERK: Yes, Judge.

(Short pause.)

THE COURT: It's been suggested you might concede the case.

MR. MUELLER: No, afraid I can't do that, your Honor.

MR. VELASCO: Invoke the Rule, your Honor.

MR. RINALDI: Invoke the Rule, your Honor.

THE COURT: We'll put somebody on the stand and [3] let the other people stay outside. Do we have chairs for them outside?

MR. MUELLER: I have no idea.

Agent Rayburn will be first.

(Government's Exhibits 1 and 2 were marked for identification.)

JAMES RAYBURN,

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

Q Will you state your full name?

A James Rayburn.

Q Your occupation?

A Border Patrol agent.

Q How long have you been with the Border Patrol?

A Eight years.

Q And have you been stationed in the Tucson area?

A Yes, sir.

Q How long is that?

A For that eight years.

Q And were you involved in a case on or about January 31, 1977, involving a person by the name of [4] Hernandez-Loera?

A Yes, sir, I was called there to assist some other agents.

Q At that time did you take a photograph of the shoes of that particular person?

A Yes, sir, I did.

MR. RINALDI: Just a second, your Honor, I object at this point in time, I think he's talking about incidents that occurred after the arrest.

THE COURT: You're not suggesting he changes shoes every once in a while?

MR. RINALDI: No, I'm just suggesting I don't think any evidence obtained after the stop is or may be a basis for substantiation of the stop.

THE COURT: What about searches of people's clothing after they've been arrested. You may have an exception, however. He said he did take a photo of somebody's shoes.

Q (By Mr. Mueller) Do you see the person in the courtroom whose shoes were photographed by you?

A Yes, sir, I do.

Q Will you tell the Court where that person is seated and what that person is wearing?

A He's seated to the rear talking to the lady wearing a dark green shirt.

[5] MR. MUELLER: May the record reflect, your Honor, that the witness has identified the defendant Hernandez-Loera?

THE COURT: I'll agree with you the witness identified a man who's sitting next to Mrs. Murphy and is wearing a dark green shirt.

Q (By Mr. Mueller) Do you have a copy or do you have the photograph you took on that particular day?

A Yes, sir, I do.

Q Was it taken on January 31?

A Yes, sir.

Q Where was it taken?

A At the Tucson Border Patrol office.

Q And have you retained custody of it since that time?

A Yes, sir.

Q You brought it to court today?

A Yes, sir, I have.

Q Is that marked Government's Exhibit 1? Would you look on the back? Is there a yellow tag?

A Yes, sir. Well, I don't know if a number is there.

Q Does it look smudged?

A Yes, sir.

Q Is that a true and accurate representation of the soles of the shoes that were worn by the man you've just identified?

A Yes, sir.

[6] MR. MUELLER: Your Honor, I move to admit that into evidence.

THE COURT: Show it to Counsel, please.

MR. RINALDI: Could I voir dire the witness on this exhibit?

THE COURT: I don't think that's the right word, but you can do it, yes.

MR. RINALDI: I'm not sure what I'm doing—

THE COURT: No, you said you were going to voir dire the witness. Those are old old Norman French words and they don't mean what you think they mean, but go ahead, try it.

VOIR DIRE EXAMINATION

BY MR. RINALDI:

Q When did you take this picture and the approximate time on that?

A Time of day?

Q Yes.

A In the morning, I don't recall, I think my hours then were seven to three and a half p.m. It would have been possibly around 9:00 a.m., I'm not positive.

Q I take it all of these pictures were taken after the defendant was arrested, is that correct?

A Yes, sir.

[7] A And after he had been stopped?

A Yes.

MR. RINALDI: I would object to the admission of it on the basis it's evidence obtained after the stop and evidence obtained after the stop and search can't be used as a basis for justifying the search.

THE COURT: I'll allow it, yes.

Exhibit 1, is it marked right.

MR. MUELLER: It hasn't been marked right in evidence.

(Government's Exhibit 1 received in evidence.)

FURTHER DIRECT EXAMINATION

BY MR. MUELLER:

Q Prior to January 31, 1977, had you ever heard of a shoe or sole marking like that?

A Yes, sir, I have.

Q Would you relate to us what you had known about it prior to that?

MR. RINALDI: I'm going to object to anything that's hearsay, your Honor.

THE COURT: I can't tell. It might not be hearsay, he might be the manufacturer and knows it from his own personal knowledge. So you have to wait like I have to wait.

[8] MR. RINALDI: Well, I think his question was: Had you heard anything about these shoes.

THE COURT: He also used the word "know".

MR. RINALDI: As long as he limits it to what he knew.

THE COURT: Come on, make it look like a lawsuit, come on.

All right.

Q (By Mr. Mueller) Would you relate to us?

A On January the 16th of 1977 I was assigned to tracking duties on the Indian reservation down off the Itak Road about four miles up from the U.S.-Mexican border.

Q Would you tell us where the Itak Road is, more specifically? We have a chart marked Exhibit 2. Would that help you in describing it?

A Yes, sir, it runs off of San Miguel Road which runs—it's—San Miguel Road is a road coming off of Highway 86 out of Sells, Arizona, goes down to the Mexican border. Itak Road runs off of this San Miguel Road. It heads back in toward the border.

Q Do you see the chart in front of you there?

A Yes, sir.

Q That's marked Exhibit 2 for identification. Do you recognize what's shown on that chart?

A Yes, sir, I do.

[9] Q Is this area you described shown on that?

A Yes.

Q Is it marked specifically or could you put that in on the chart?

A Beg your pardon, sir?

Q Could you mark that on the chart?

THE COURT: Mark what on the chart? Itak Road?

MR. MUELLER: Yes.

THE COURT: Yes.

THE WITNESS: With a letter, sir?

MR. MUELLER: Just mark the road—

THE COURT: Evidently the road is there, he wants to know shall he identify it.

Q (By Mr. Mueller) Designate it as Itak Road.

A It's so marked by name, the road into Topawa, into Itak would be Itak Road.

Q Then would you mark with an X with a circle around it then a letter A beside it, where you began this tracking that you told us about? Have you done that?

A Yes, sir.

Q Now, where would that be located in relation to the border?

A It would be straight north about four miles from the border, sir.

Q All right. Describe for me what you observed, [10] based on your tracking that day?

A Agent Gray had been on this truck track prior to my joining him on motorcycle, and the group of aliens, I believe had a group of about fourteen to sixteen illegal aliens.

MR. RINALDI: Just a second.

THE COURT: I think the question was, if you recall it, would you describe what you did. Wasn't that the question, Mr. Mueller?

MR. MUELLER: Yes, and what he observed.

MR. RINALDI: Oh. Can I voir dire the witness then at this point, your Honor?

THE COURT: Of course not. You do that, you ask for permission for the voir dire examination when some

exhibit is about to be offered, and not when you're surprised about testimony.

Q (By Mr. Mueller) Will you continue, please, and relate to us what you observed and what you did?

A Amongst this truck track was—

THE COURT: Are we talking about what you saw or what he saw?

THE WITNESS: What I actually saw.

Amongst this truck track was this chevron design print, was a print I'd previously seen in the Sells trailer where we work our detail out of.

[11] Q (By Mr. Mueller) Would you explain that more fully what you mean by having previously seen this?

A I was asked to assist Casa Grande Border Patrol agents in processing a large group of aliens.

Q When was this?

A I don't recall the date, sir?

Q Approximately what month, what part of the month?

A December.

Q What part of December?

A The beginning of December, early December I would say.

THE COURT: In the year before are you talking about or some other?

THE WITNESS: 1976, sir.

Q (By Mr. Mueller) Tell us what happened.

A While I was assisting them they pointed out that they had drawn this picture from a print that appeared to be—well, that they had established was guiding—

MR. RINALDI: Objection, your Honor.

THE COURT: Immaterial, I have trouble following who they are and what it was that they were pointing to. Will you start again? You say it was early in December of last year when you were making some assisting—or you were doing some assisting somewhere.

THE WITNESS: Yes, sir, I was assisting them in [12] processing a group of illegal aliens.

THE COURT: Assisting them means other—

THE WITNESS: Other border patrol agents from the Casa Grande station, two agents were on detail at Sells at that time.

THE COURT: And what happened during that assisting?

THE WITNESS: They showed the track to us, asked us to be alert, to be looking for this particular print, as this print was guiding illegal aliens up from Mexico.

MR. RINALDI: I object, your Honor, on the basis that's hearsay what they told him what the track has been doing.

THE COURT: Yes, but what's wrong with it, though?

MR. RINALDI: Well, he's offering it as evidence the track is in fact—

THE COURT: No, he was told to watch this track, he says somebody told him they were the tracks of other aliens, but I don't see what makes it inadmissible.

MR. RINALDI: Because—

THE WITNESS: It's how.

THE COURT: It's how he acquired some knowledge, like I did when you were in college, the professor said, Look at this and see if you don't learn something. I'll allow it, you may have an exception. All right.

[13] Q (by Mr. Mueller) Continue and tell us about this occasion when you were assisting the Casa Grande officers.

A In showing the track to us they pointed out to us it had eight forward pointing chevrons in the front part of the sole of the boot, had three rear pointing chevrons in the heel of the boot with the last chevron pointing forward to form an X or a laying down X in the heel.

Q Did they show this to you on some kind of a drawing?

A They had a drawing of it in the trailer.

Q Where was this drawing?

A They had it pinned up on the wall of the trailer right near the door.

Q Did it have any—was it there for a particular purpose, to your knowledge?

A Yes, sir, previously a case that they had handled, the illegal aliens had identified the man as having been the man they arranged to guide them up to meet a smuggler off of Highway 86.

Q Why was this posted on the wall in the trailer at the Border Patrol trailer?

A To alert other agents to this as they went on detail. It was a way of passing the information on to other officers that would be working the area.

[14] Q Okay. And so getting back to January 16, did you see this same track again?

A Yes, sir.

Q And it was among a group of other tracks?

A Yes, sir, it was.

THE COURT: Wait, I got lost on that, Mr. Mueller. Is January 16 the—

MR. MUELLER: I believe this is the day he related he was out cutting the sign.

THE COURT: I'm sorry, yes.

Q (By Mr. Mueller) All right. Go back to that point in time.

A To the January 16th date?

Q January 16, yes. You were at Itak Road about four miles north of the border?

A Yes, sir, we then proceeded on this group of illegal aliens from that point up to about Milepost 19 on Highway 86.

Q Who was with you?

A Agent Gray.

Q Agent Wayne Gray?

A Yes, sir.

THE COURT: I got lost. You didn't follow the track all the way up to Milepost 18, did you?

THE WITNESS: Yes, sir, we did.

[15] Q How many miles did you cover?

A Approximately, well, the speedometer on my bike I clocked 22 miles.

Q How did you do this tracking?

A On motorcycle.

Q You and—

A Agent Gray.

Q You and Border Patrolman Gray had a cycle each?

A Yes, sir.

Q And will you describe this path or this track that you followed. Tell us something about it.

A The group as a whole, sir?

Q Yes.

A They were difficult to make an accurate count on the group as they were walking more in a single file, except for where obstacles would cause them to fan out. It was at these fan out like indications that we attempted to make an accurate count of the track. It was very fresh track, having been made after rainy weather. We could tell that it was—the group was walking at nighttime and that they would go into an obstacle before making a change to go around an obstacle. They would cross over mole hills or ground squirrel hills, causing themselves to sink down quite deeply, where had it been daylight they would have avoided going across these.

[16] Q Did they run into any fences?

A No, sir, not into, but into brush or cactus they would walk into it making the change maybe right at the obstacle itself, instead of some distance ahead.

Q What else did you notice? Did you notice any rest stops—

THE COURT: Excuse me, am I getting the impression all of these footmarks were—had the same chevron type—

THE WITNESS: No, sir, no, sir, only one of that type in the group. The others were combinations of tennis shoes, I can't recall all of the other particular tracks.

THE COURT: But there was only one showing the chevron marks?

THE WITNESS: Yes, sir.

Q And did you notice anything in particular about where that set of footprints might proceed as opposed to the others? In other words, was there anything in particular about it and the way it was placed on the ground in relation to the other tracks you saw?

A In the instance where it appeared we had a single file walking, it would appear to have been the lead track. This by the amount of track which would knock portions of it off, and we would have to wait until we'd get the fanning effect to again get the full print of the chevron [17] track itself.

Q Were there any—was there any indication from this sign there were any rests made?

A No, sir.

Q How could you tell if there had been?

A If there had been a rest made in that fresh a ground, you could have seen where sitting down had occurred. There would be a change in the direction of the track in that you would get some milling around of tracks. It wouldn't be directional.

Q You saw no such signs?

A No, sir. Plus you would have the debris of having snacked or what have you.

Q Did you see any sign that they had taken any what might be called a comfort break or stop?

A No, sir.

Q Did you find that to be unusual?

A Yes, sir, we did. Most normally you'll get your walking periods and sets of four to six hours, then you'll have a rest stop.

Q Was there any sign of any human elimination along the way?

THE COURT: Isn't that what you meant by confort break?

MR. MUELLER: Yes, sir, I didn't know if—

[18] THE WITNESS: No, sir.

Q (By Mr. Mueller) Okay. When you were making or trailing this one set of tracks did you notice any other tracks, groups of tracks?

A This track paralleled and even criss-crossed a group that had been made some three to four days prior to this particular track. It was difficult to time the other track, as since it had been made rain had fallen upon it.

Q Did you notice anything or notice any tracks among that group?

A Agent Gray and I discussed that the chevron track had been with the older group as well.

THE COURT: The question was did you notice any chevron markings in the other group.

THE WITNESS: Yes.

THE COURT: Yes.

Q (By Mr. Mueller) You saw the chevron mark?

A Yes.

Q Now, you say you followed this set of tracks for how far?

THE COURT: 22 miles.

THE WITNESS: About 22 miles, sir.

Q (By Mr. Mueller) Do you have any way of estimating how fast these people may have been walking?

[19] A We're trained and we find that the rule of thumb is that they'll maintain a pace of from two and a half to three miles an hour.

Q And how long would it take the group to travel this distance from the border following this trail?

THE COURT: Well, let's divide that ourselves and say it was about three into twenty-two and see what happens.

THE WITNESS: Well, sir, we'd have to add back the time, the four miles that I was from the border itself.

THE COURT: Well, the question was how long it would take them to travel 22 miles or from the border.

MR. MULLER: From the border to the highway, do you have an estimate of that?

THE WITNESS: I would say eight to twelve hours, sir.

Q (By Mr. Mueller) Now, calling your attention to the highway, was this Highway 86 on the Papago Reservation?

A Yes, sir.

Q What Milepost did they intersect?

A They arrived at the highway at Milepost 119 and paralleled it on down to Milepost 122.

Q What direction of travel would they have been going in from 119 to 122?

A Eastward.

[20] Q How far from the highway were these tracks?

A That varies, as the brushline which divides their walking and the highway it would vary from fifty yards to seventy-five yeards.

Q During daylight hours could they have been seen from the highway?

A In daylight they could have, yes.

Q What kinds of growth was there along the path they took along the highway?

A Broken mesquite brush, palo verde brush, ironwood. Not a consistent belt, but patches that would be with clear spots.

Q And Agent Wayne Gray was with you along this entire route?

A Yes, sir.

Q Did you notice anything about—well, what happened about Milepost 122, let's put it that way.

THE COURT: Milepost 122?

Q (By Mr. Mueller) Did you say Milepost 122 was the last milepost?

A Yes, this particular day.

THE COURT: I'm sorry, does 122 mean a hundred and twenty-two miles?

THE WITNESS: No, sir, that Milepost 122 is off of the port of entry down at Lukeville, Arizona. That's [21] where that milepost comes from. It has nothing to do in relation with the borderline—

THE COURT: I'm confused then, when you say they appeared to parallel the Route 86 for a period of miles and they finally entered the highway at Milepost 22 or Milepost 122?

A THE WITNESS: At Milepost 122 they left the brush, walked up on the pavement of the highway itself.

THE COURT: Thank you.

THE WITNESS: We covered—I don't recall the exact amount, but we kept making circles on either side of the highway to try to get the tracks started again off the highway.

Q Beginning at Milepost 122?

A Yes, sir. We went up to Milepost 125. I do know that because we were picked up at Milepost 125.

Q Did you locate or pick up these tracks again on any side of the highway within two or three miles?

A No, sir, we did not.

Q From that what did you infer?

A We felt that the group had been picked up and ended our operation from that point.

Q Okay. Calling your attention again to Exhibit 2 for identification. Does that have represented on it anything

that indicates this general trail that you tracked [22] on the 16th?

A Yes, it has a dotted line, which would indicate the path, roughly the path that we had followed the group of illegal aliens.

Q Would you pick that up and indicate to the Court what you just said?

THE COURT: You know one of the things that's missing and I suppose I'll learn about it, was, or is, that this dotted line or path or whatever it is, there's going to be some proof they were made by some aliens entering the country illegally.

THE WITNESS: Well, where Agent Gray—

THE COURT: No, I was addressing myself to the lawyer.

MR. MUELLER: There is—

THE COURT: Assuming what the agent says is correct, the only thing that's missing is that the prints were made by aliens entering into the country illegally and evidently picked up somewhere on the highway.

MR. MUELLER: Well, this relates to prior experience and knowledge.

THE COURT: Yes, in tracking.

MR. MUELLER: And tracking, but he—

THE COURT: But he keeps adding tracking illegal aliens.

[23] MR. MUELLER: Okay.

Q Would you relate to us the basis for your conclusion as to these being tracks of illegal aliens?

A Previously any group that we would track like this covering this much distance, having crossed travelled roads yet not using a travelled road, upon catching—tracking up to people, we've always found that they were illegal aliens.

Q Is this—

A This area is heavily used by illegal aliens. Not the particular route itself, but the general area.

Q What do you mean by "general area"?

A From the Baboquivari Mountains where they go down to the Mexico borderline.

Q Are they shown, the Baboquivari Mountains, on the chart there?

A Yes, sir, they are, all the way to the La Lezna Mountains.

Q To the west of the Baboquivari?

A Yes, the La Lezna Mountains aren't on the map, it's some distance.

Q What kind of area is that?

A It's all desert area spotted with mountains.

Q What degree of population is there in that area?

A Very very low degree of population outside of [24] Sells proper, Sells itself.

Q Sells is up on the highway, is it not?

A Sells is the main village for the Indian reservation.

Q But down near the border are there any villages down there?

A There are a few villages which would have some two families, some only one family, some up to eight families living at the village.

Q And on how many occasions based on your prior experience have you tracked similar tracks which resulted in finding illegal aliens?

A When assigned to sign cutting operations, on a daily basis, maybe three to four groups daily, depending on how much time it takes to complete one tracking operation, whether or not you would go to a second or third or fourth operation.

Q Can you estimate how many times you've done that in your career of eight years in the Tucson area with the Border Patrol?

A Line watches are primary spots, our tracking opera-

tions come within line watch. They schedule us to maintain about seventy-five percent line watch operations. I don't think I could accurately make that—any kind of an estimate on that.

[25] Q Can you give us a general total estimate of how many times you've done that? In other words, track and located aliens.

A It would be over a thousand times, sir.

Q You personally?

A Yes.

Q Okay. Would you point out to the Court the trail that you followed, if it is indicated on that chart, on the 16th of January?

A It would be this dotted line. I began off of Itak Road a short distance south of Itak Road, followed the track on up to 119, paralleled the road to 122 where we lost the track. The mile marker being right at the area where we lost the track.

Q Is there any name given to that dotted line on the chart?

A Name?

Q Yes. I notice I think a red line there that seems to be given a name of Highway 86.

A Well, we have Highway 86,—the top line being Highway 86—

Q Describe the features on that chart, if you will.

A The top line is Highway 86, runs from Tucson down to Ajo. From Sells, the next road we have is the San Miguel Road that runs down to the border, where that's [26] a wire gap gate on the border. The large drawing here is the Baboquivari Mountains.

Q This is south of Highway 86 to the border?

A Yes, sir.

Q And it's on the right-hand side of the chart?

A Yes, sir.

Q Almost near the center of the right side?

A Yes, sir, this large—the larger mountain drawing.

Q What else do you have shown on there?

A We have the Highway 286 which goes down to the port of entry at Sasabe, Arizona.

Q Where is that is relation to the other.

A That's to the far south. It's this road marked here.

Q To the east of the Baboquivari Mountain area?

A Yes, sir. This bottom line being the International border.

Q It's diagonal to the bottom of the chart?

A Yes, sir.

Q All right. On that black dotted line would you mark in with your pencil or pen the chevron trail, if you will? Is that the trail where you saw the chevron marking?

A The dotted line would have to run fairly accurate to the track we did on January the 16th, the group we [27] followed would have taken that path.

Q Okay, would you mark that then the chevron trail, just alongside of the line like you've done with the highway.

THE COURT: I wonder, is that necessary? He said it's the dotted line. It's the only dotted line on the thing.

MR. RINALDI: Is it a black line or red line?

MR. MUELLER: Black dotted line.

THE WITNESS: It's black. It's separate from the other.

MR. MUELLER: Well, we won't mark it any different.

Your Honor, I would move to admit this in evidence for illustrative purposes.

THE COURT: I don't know whether Counsel has seen it. Show it to him.

MR. RINALDI: I would object to the relevancy of the thing even for illustrative purposes since the arrest was on the 31st of January and all this relates to something that occurred on the 16th of January.

MR. MUELLER: I'll avow that I'll connect it up.

THE COURT: Receive it, Exhibit 2, with exception to Counsel.

MR. MUELLER: That's all I have of this witness, your Honor.

[28] THE COURT: Cross.

CROSS EXAMINATION

By MR. VELASCO:

Q Agent Rayburn, on that diagram could you indicate where the La—

A La Lezna Mountains?

Q Yes, would you indicate where those are? Would they be at the edge—

A Shall I draw where they would be?

Q Yes, would you please?

A The La Lezna are mostly in Mexico.

Q And how far is it from that mountain range to the other mountain range you've indicated?

A I don't know, sir. There are no roads to—

Q You don't know what the distance is?

A To measure that distance.

Q Can you estimate what the distance is?

A You want me—want the distance from the Baboquivari Mountains to the La Lezna Mountains?

Q Yes.

A May I use the port of Sasabe for a point of reference?

Q Sure.

A From the point of Sasabe to the La Lezna would [29] be about eighteen miles.

Q And from Sasabe to the Baboquivaris would be about how far?

A About four miles.

Q So it's a distance of about 22 miles?

A Four to five miles. Sir?

Q It's a distance of about 22 miles?

A No, sir, I took the distance from the port of Sasabe to La Leznas would be about 19, so from the mountains themselves would be about fourteen miles.

Q And you indicate that on a previous occasion you had assisted the Casa Grande sector?

A Yes.

Q Is the Casa Grande sector on that map, sir?

A The Casa Grande Border Patrol station was working out of the Sells trailer, it's a Border Patrol trailer at Sells. They were on a catch detail down there.

Q How far away is the Casa Grande sector?

A Casa Grande station?

Q Yes.

A I don't know, sir. I think it would be about 85 miles.

[30] Q 85 miles?

A Yes.

Q And this area around Sells, is that part of the Tucson sector?

A As of February, yes, sir.

Q As of February it is?

A Yes, sir.

Q And previously it used to be the Casa Grande sector?

A Station.

Q And are you assigned to the Tucson sector or Casa Grande sector?

A I'm assigned to the Tucson station.

Q And have you interchanged with the Casa Grande station?

A We worked or assisted Casa Grande with the Reservation area since I've been in the Border Patrol.

Q For those eight years?

A Yes.

Q You indicated earlier that the distance—that that area in-between those ranges, those two mountain ranges is frequently used by smugglers, is that correct, or aliens?

A Yes.

Q Or you believe it's used by aliens?

[31] A Yes.

Q Isn't that in fact true from almost all of the border from Lukeville to Douglas?

A Yes, sir, it is.

Q And you say that there are—Sells is the main village in that area, about how many villages are there in-between those mountain ranges and south of Highway 86?

A How many?

Q Yes.

A In the entire area, sir?

Q In that 22-mile area.

A They have a small village at San Miguel which is—

Q Just give me an estimate of how many of those you believe there are there.

A About five.

Q Five in all? And does that include the total amount of inhabitants in the area or are there just one house dwellings here and there or one family dwellings?

A No, sir, there will be some unoccupied dwellings in a village. I wouldn't have the figure there that you're asking for.

Q The Casa Grande unit that first found the chevron, do you know where they found that chevron?

A When they first found it? No, sir, I do not.

[32] Q And you don't know where they found it, either, do you?

A No, sir.

Q And so the only information you have is that prior to January 16th somebody had seen a chevron track among other tracks?

A I had been involved in discussions on tracking on the Reservation which also discussed this track having occurred January the 3rd or 4th, also.

Q And do you know where that was?

A Yes, sir, basically the same route.

Q Same route or the same area?

A The same route, sir.

Q The same route, too? You're saying the only people that used that route had a chevron track with it?

A This particular one route, from descriptions we were being given by one another, always had the chevron track present. If it went to this point where it paralleled 86 from the one nineteen area to 122, yes, sir.

Q So we're talking about that three mile—you're talking about that three-mile space?

A No, sir, I'm talking about where—as this path is drawn, it was repetitious that this would be—the chevron track would be with the group coming along this path.

[33] Q And that's based on information you believe you heard on the 3rd of January and 16th of January?

A On the 16th I was there.

Q You saw it on the 16th, heard about it on the 3rd of January?

A Well, in-between those two dates, that a group had been followed on the 3rd or 4th of January date. I don't recall what date exactly, I just know it was right after the first of the year.

Q Am I correct in assuming that all you have ever gathered from that trail is simple tracks. You've never stopped anybody, have you?

A No, sir, we had not.

Q And you've never been able to determine how many people or who these people were, have you?

MR. MUELLER: Your Honor, I object to this as to points of time as to identifying who these people were.

Q (By Mr. Velasco) From the 16th back. Let me ask you this: From the 16th back did you apprehend any people on the route?

A The Casa Grande agents had apprehended a group of illegal aliens. It was from this apprehension that they took their drawing. On the name—they had a name listed on the drawing of the chevron track, this name was Pedro Hernandez-Loera.

[34] Q Do you know where they picked up that track?

A I could not recall the exact spot where this apprehension had been made.

Q So the information you have available to you is such that no one's ever been apprehended on that particular trail, isn't that correct?

A I don't recall, sir.

Q Is that particular area in your line cutting duties, do you always inspect that particular route?

A After we establish a pattern of this nature, then we would, in order to try to save time, go to something of this nature. We would try to go to this point to minimize the amount of time we have to spend searching for track.

Q Did you go to that point every day?

A There for—no, sir, I did not.

Q Did someone go to that point every day?

A No, sir.

THE WITNESS: At that time—

THE COURT: No, my question was, Counsel established that nobody went every day. My question was did somebody go frequently?

THE WITNESS: Frequently, yes.

[35] Q (By Mr. Velasco) When you say frequently, does that mean five times a week, four times a week?

A The Casa Grande agents would go as they were detailed to the Sells area. We would go as we were assigned.

We would not be assigned to the area five days in the week, because our assignments were only to assist their station is filling the gap.

Q So you don't know what the number of times people would go there?

A No, sir.

Q In your detail how many times did they go there?

A We were merely assigned on a daily basis, sir. Not on a detail basis.

Q How many times did you personally go down there?

A To the one particular trail?

Q Yes.

A This one day, January the 16th.

Q Were the people—were the tracks that you found always fresh? Were they very fresh that day?

A The group that we chose to track were very fresh, yes, sir.

Q Are you saying there were other groups of tracks there?

A Yes, sir.

Q Did they go in the same direction or different [36] direction?

A Exact same direction.

Q Exact same direction, and were these tracks of people who appeared to be travelling without any luggage or without—were the tracks deep or where they light or what?

A That would depend on the terrain. As we went into harsh terrain, the tracks would be light. As we went through sandy washes, it would be deep.

Q Did it appear to you these people were carrying anything of any substance?

A No, sir.

Mr. VELASCO: I have no other questions.

CROSS EXAMINATION

BY MR. RINALDI:

Q Did you ever fill out any written report in reference to this?

A Yes, sir.

Q So just to recap your testimony, at some point in December someone indicated to you that there had been signs of a chevron shoe in the area of Sells, is that correct?

A That's when they brought the sign to this particular route.

[37] Q And you didn't know where the sign had been picked up or who had picked it up, but you had just been advised to be on the lookout for it?

A Yes.

Q Is that accurate? Then on January 4th, about that time, you were advised a second time that they had seen the chevron again?

A After January the 4th.

Q Okay, did they advise you of the specific time or place they had seen the chevron the second time?

A The specific place I was told. I think they had gone backwards on this track to establish exact place of entry.

Q And do you recall who told you that?

A Agent Gray and one of our pilots.

Q And then on January the 16th you actually saw the track?

A Yes, sir.

Q So that you actually had three occasions in which you had either discussions or actual visual contact with the track?

A More than three.

Q Well, prior to the 16th?

A More than three prior to the 16th.

Q What were the other occasions?

[38] A This had—in groups, this particular track had been discussed quite a bit. We discussed things like it appeared that we had one night journeys, for instance, things of that nature.

Q Did it ever occur to you there might be more than one pair of shoes like that since the track was so prevalent?

A Another thing that had been pointed out to us—

THE COURT: No, the question was, Counsel wanted to know, don't you think—did you come to any conclusion that it was more than one pair of shoes? Was that the question?

THE WITNESS: I felt that it was one pair of shoes reoccurring.

THE COURT: Although you had allowed the possibility that it could be more than one?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) On the 16th, you say that the tracks were fairly fresh, is that correct?

A Yes, sir.

Q Can you tell within two or three hours or—what time frame can you tell on tracks? I mean, how close can you pin it down if I walk through a vacant lot at 2:00 o'clock in the afternoon, and you come by at 6:00, can you tell if it's four hours? How accurate can [39] you be on that stuff?

A You can be extremely accurate after following and establishing a walking pattern. This accuracy can be increased if you can weed out the possibility of night walking, limiting the track to day, then knowing the time of day, you're on the track.

Q Now, you saw the track on the 16th of January?

A Yes, sir.

Q And approximately what time did you first run into it?

A Early morning.

Q Okay. And at that point in time were you able to determine how old the track was?

A We felt it had been made the night before.

Q In other words, within the previous twelve hours or so?

A Yes, sir.

Q Could it have been within the previous 36 hours?

A No, sir.

Q Now, you indicated that the reason you could tell that the chevron was probably the lead track is because other tracks would track over it, the people following behind.

A With partially—well, some points totally track over, some points partially. You'd have to have a fan go [40] go out before—

Q But you couldn't be absolutely certain that was the lead person, I mean he could have been the second or third or fourth person?

A Yes.

Q In a group of ten or fifteen people, is that correct?

A That is correct, sir.

Q So there could have been other people actually leading the parade, couldn't there?

A Yes, sir.

Q Did you ever—what kind of training have you had in tracking sir? Did you ever go to school or anything or is this just all on-the-job training?

A We're trained by—as we first come in, by other journeymen agents. The only way to train for tracking is trial and error.

Q And so your entire experience or your entire knowledge is based upon the experience you've had in eight years out in the field?

A Yes, sir.

Q Were you able to ascertain on January the 16th what time the individuals whose tracks you saw had—well, first

of all did you track the tracks back to determine where they had entered the border?

[41] A Agent Gray had begun the track from the border area.

Q Oh, and you picked it up—

A I joined Agent Gray—

Q Was Agent Gray or you ever able to determine what time those tracks had actually crossed the border?

A I think we pretty well knew it would have been late evening, possibly just at sundown.

Q Is it possible they could have crossed at 2:00 in the afternoon?

A I don't think so, because immediately after he began the track he commented that it appeared they were not moving at nighttime.

Q You mean because they were walking into obstacles?

A Not hitting the obstacles but making their change much too close to the obstacle.

Q Now, after you tracked them up to Highway 18—I mean up the highway—they reached the highway at approximately 118, is that correct?

A 119.

Q Then they walked about three miles to Milepost 122, is that correct?

A Yes, sir.

Q Then the tracks were suddenly lost?

A The tracks made a drastic turn, they were going [42] east parallel to the highway, then they turned directly north walking straight to the highway, up the berm of the roadside into the pavement.

Q When you reached the pavement what, if anything, did you notice about the pavement or anything on the pavement? Did you see any additional tracks there?

A Not on the pavement, no, sir.

Q Did you check both sides of the road to determine whether they crossed over to the other side of the road?

A Yes, sir, we did.

Q And they hadn't gone on?

A No, sir.

Q So you concluded from that they were picked up by some vehicle?

A Yes.

Q Did you find any debris or anything that would suggest the kind of vehicle?

A No, sir.

Q So would you agree with me then the vehicle could have either gone on to Ajo or Casa Granda after picking them up or it could have gone on to Tucson?

A Could have gone either way, sir.

Q You have no way of knowing which way it did in fact, though, do you?

A No, sir.

[43] Q Now, would you sort of elaborate for the Court where this area is in relation to Casa Grande on the map? Where would Casa Grande be on this map, approximately?

A Off of it. We'd have a junction here, have Route 15 coming out of this Quijotoa. This highway of course would continue on. This runs on up into Casa Grande, continues on the Reservation, runs up to Casa Grande, which would be roughly up in here.

Q Okay, do you know how far it is from Sells to Casa Grande?

A No, sir, I don't.

Q Do you know how far it is from Casa Grande to this junction here?

A No, sir, I don't.

Q Is this map to scale that you have here?

A I don't believe so.

Q In fact isn't the Casa Grande function just a few miles out of Sells?

A No, sir.

Q Approximately how many?

A This is Milepost 98, roughly. Here we are right at Milepost 114, roughly.

Q So it's about 16 miles from Sells to the Casa Grande junction?

A To this Quijotoa.

[44] Q And from the pickup point it would be about 24 miles to the Casa Grande junction, to Quijotoa?

A Yes.

Q From Quijotoa to Casa Grande you have no estimate as to how far that distance is?

A I don't know, sir.

Q But this is an all-purpose road that leads straight up to Casa Grande from Quijotoa?

A Yes.

Q From Casa Grande there's a straight highway or the I-10 straight to Phoenix, isn't it?

A Yes.

Q Did you ever see on January the 31st, prior to arresting Mr. Loera here—

THE COURT: You're a little bit beyond yourself, I think. It's a little bit beyond the direct, Counsel.

Q (By Mr. Rinaldi) Now, you've indicated that you've tracked aliens in this area a great deal, is that correct?

A Yes.

THE COURT: Tracked aliens, did he say? Have you tracked them?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) Excuse me, I'll withdraw the question and the answer.

[45] THE COURT: The witness agreed with you anyway.

Q (By Mr. Rinaldi) You've tracked individuals in this area?

A Yes.

Q Okay, would you agree with me by looking at the footprints you can not determine whether it's a Mexican alien, an American citizen or Papago Indian?

A No, sir.

THE COURT: He said he would not agree?

THE WITNESS: I do not agree.

Q (By Mr. Rinaldi) You do not agree. You can by looking at the footprints themselves tell the type of person that's wearing the shoes, is that correct?

A By following, by tracking, we can, yes, sir.

Q Would you elaborate on that then?

A The way of life in the country of Mexico is to walk. They have a much much stronger walking pattern than what would be a United States citizen. I think we're—

Q Do Papago Indians walk a lot?

A No, sir.

MR. MUELLER: Your Honor, I object. He's interrupting the answers.

MR. RINALDI: I thought he was finished.

Q Did you want to say something else?

THE COURT: You were about to explain how it is [46] that you can tell from the foot tracks the type of individual who made them. You said Mexicans have a much stronger mark, is it, or much stronger what?

A Well, their durability for walking great distances is much better than ours.

THE COURT: But fill me in as to what you said. The Mexicans had a much stronger what, impression, is it?

THE WITNESS: Walking pattern, sir, the overall pattern.

THE COURT: How about Papagos? Had you finished then what you started?

THE WITNESS: No, sir. I was going to point out that often in these groups we'll see tennis shoes, it's not a common walking shoe. We'll see the Wawache tread, which is a tire tread or sidewall of a tire. The type of track

left is often how you establish you have illegal aliens moving.

THE COURT: Are you finished?

THE WITNESS: Yes, sir.

THE COURT: Next question, please.

Q (By Mr. Rinaldi) Did you see any Wawaches in this group you were tracking?

A I do not recall exactly.

THE COURT: See any what?

Q MR. RINALDI: Wawaches.

[47] Q In addition to this trail you described are there other trails in the area?

A Yes, sir.

Q And they roughly run parallel to the trail you're describing now?

A Yes, sir.

Q You mean they traverse from the border up to the highway?

A Yes, sir.

Q And just finally, you arrested no one on January 16, is that correct?

THE COURT: Did you arrest anyone on January 16?

THE WITNESS: Yes, sir.

THE COURT: He said he did. Next question.

Q (By Mr. Rinaldi) In reference to this tracking?

A No, sir.

MR. RINALDI: Thank you.

THE COURT: That's all, gentlemen?

MR. MUELLER: No, I have some questions.

REDIRECT EXAMINATION

BY MR. MUELLER:

Q With reference to the arrest you just mentioned, what was that, you said you had made some arrests?

A January the 16th?

[48] Q No, prior to that.

THE COURT: No, the question was: Did you arrest anyone on January the 16th, expecting the answer to be no, but the answer came in yes.

Q (By Mr. Mueller) Was someone arrested on January the 16th?

A Yes, sir.

MR. RINALDI: I object to the materiality of this.

THE COURT: No, you asked the question, Counsel, you opened the door wide open, left it open.

Q (By Mr. Mueller) Would you relate what you mean?

A No, sir.

Q Would you tell us what you mean by there being an arrest on the 16th?

A After we stopped the operation and were returning to Tucson, we arrested three illegal aliens just out of Tucson.

Q That was not to your knowledge related to those tracks you had been—

A No, sir, it was not.

Q Okay, previously, you said that you had knowledge of certain circumstances of the Border Patrol getting the name of Hernandez-Loera and being able to duplicate this track. On a piece of paper?

A Yes, sir.

[49] Q A drawing of the track on a piece of paper. Would you relate to us how they got that information?

MR. VELASCO: Your Honor, that's beyond the scope of cross.

THE COURT: I think so, too, but I think it was brought out on Mr. Velasco's testimony. It wasn't your cross, obviously, but it was the other man, the other defendant's counsel. You may tell us.

Q (By Mr. Mueller) Would you tell us what the basis of that information was or source of that information or incident that caused that information to come about?

A It was from an apprehension that the Casa Grande Border Patrol agents had made. The apprehension had actually been made by Sells law and order. The aliens and Mr. Hernandez had been turned over to the Casa Grande agents, and in interviewing the illegal aliens they had pointed out Mr. Hernandez as the guide.

Q As the guide?

A Yes, sir.

Q And was prosecution declined on that case?

A Yes.

Q And at that time did they actually observe this boot or shoe print?

A Yes, sir.

MR. RINALDI: Objection, your Honor.

[50] THE COURT: It sounded like an objection.

MR. RINALDI: Yeah, I don't know how he could tell what they observed or didn't observe.

THE COURT: Maybe you haven't got the skill, but in time you might learn it, I don't know how you can tell. That was the question, wasn't it, how you could tell?

MR. RINALDI: My objection was how he could tell what they observed, what they observed was peculiar to that knowledge.

THE COURT: You didn't make that objection. All right, next question.

Q (By Mr. Mueller) You were asked whether you could conclude whether this was one track or several people walking with the same type of sole on their shoe. I believe you stated you concluded it was only one track. Why could you conclude that? In other words, why could you conclude it was only one person?

A Well, the size of the print in itself was larger than normal. The illegal alien shoe size averages around a size

seven or eight. This appeared to be larger. This was a twelve-inch track was made, as we could measure it. It's not a—it was an uncommon track.

Q Did the amount of—well, strike that.

You also stated that you could determine the age of the tracks that you saw on the 16th, at least the most [51] recent set, to have been made in the last twelve hours but not the last 36. How could you determine that? In other words, how could you tell they had only been recently made?

A Because only a few days before we were on this operation, we had had only a short period of time before we had light rains in the area. This track had been over any rain.

Q What do you mean by "over any rain"?

A It had been made since the rain had stopped.

Q Well, on that same day, on the 16th, you said you saw this one fresh set of tracks and then there was another one you estimated to have been made three or four days before that, is that correct?

A Somewhere. We could not tell you how old the other track was, but it had been made before the rain.

Q Now, you were asked by Mr. Rinaldi whether you knew which way the vehicle went after picking up the aliens. Did you—for sure, I mean you couldn't absolutely say for sure. But did the direction of travel of the tracks themselves, in other words, I think you testified in an easterly direction, suggest anything to you as to which direction the vehicle may have been—

THE COURT: The question was whether he knew, the witness said he couldn't tell, but what inference he [52] could draw from the track I don't think would help us.

Q (By Mr. Mueller) From Milepost 121 or 122 on Highway 86, how far is it from there to Interstate 10 near Tucson? Do you know the distance, would you be able to give us the distance?

A It's about 40—right at 50 miles.

Q Is it less mileage from—at Milepost 122 to that point on I-10, closer to go that way than it would be to go to Casa Grande and get onto I-10?

MR. VELASCO: Objection, closer to where, your Honor?

THE COURT: I have no idea.

Q (By Mr. Mueller) Less mileage.

A Yes.

MR. RINALDI: Let's ask him if he knows first, he didn't seem to know previously.

THE COURT: You want my robe? You want to wear the robe?

MR. RINALDI: I'm objecting.

THE COURT: You're not objecting at all, you're spouting, spouting off like it was a debating society.

Next question please.

MR. RINALDI: Was there an answer to that question, your Honor, I was speaking and I must have missed it.

THE COURT: Next question, Mr. Mueller.

[53] Q (By Mr. Mueller) You said that there were other trails in the area similar to this trail. How close are they to this particular trail? In other words, describe to us what you meant by this area and these other trails you said went from the border to the highway.

A Well, between the San Miguel Road and the Baboquivaris itself is the heaviest entry area. These aliens walk in a northerly direction up and cross Highway 86. We get a funneling effect from the Baboquivari Mountains in that the mountain area, the Spotted Mountains near the Sells area causes a kind of funneling effect down into the northern Iguirre Valley.

Q So what area—how many miles is it across this valley you've just described, approximately?

A It's around 14 to 16 miles and it drops down to about eight miles in some places.

Q And these other trails in this, you described, were in that 14 mile span?

A Yes, sir.

Q And you weren't referring to another trail say 50 yards from this particular trail you tracked on January 16. In other words, these other trails which you were talking to Defense Counsel.

A No, sir.

Q Mr. Rinaldi or Mr. Velasco asked you how many [54] villages there were. You said there were about five in that valley area, is that correct?

A I took Mr. Velasco to mean in the San Miguel Highway area or the Alverez Mountain area, and I would say about five.

Q And in those villages in total, how many people would you estimate there are living?

A I couldn't say, sir. Not very many.

Q Couldn't even give a general estimate?

A No.

Q Ten to a hundred or two hundred to a thousand?

A Under a hundred.

Q Now, on January 16 you said you were working with Agent Wayne Gray. Did you relate some of the prior information you had that you had obtained in December 1976?

A Just the description of the track, the general area that it would arrive at Highway 86. While tracking it on the 16th, Agent Gray again went over—

MR. VELASCO: Objection, your Honor. It's beyond the scope of the questions.

THE COURT: Yes, it is.

Q (By Mr. Mueller) Did Agent Gray relate anything to you about his prior experience?

A Yes, sir, he—

Q When did he have prior experience?

[55] MR. RINALDI: Just a second, objection.

THE COURT: Yes, Counsel, this is beyond—you're now on redirect.

MR. MUELLER: That's all I have. Thank you.

THE COURT: That's all, gentlemen?

Thank you, sir. You may step down.

MR. MUELLER: Your Honor, may this witness be excused? He's under subpoena in Superior Court for a trial, I believe it is, that started at 9:00.

THE COURT: I would think so, yes.

MR. MUELLER: Agent Gray.

WAYNE GRAY,

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

Q Would you state your name, please?

A Wayne Gray.

Q Your occupation?

A U.S. Border Patrol agent.

Q How long have you been with the Border Patrol?

A A little over three years now.

Q And did you have any law enforcement experience [56] prior to that?

A Yes, sir, I worked for a year on the City Police in Hobbs, New Mexico.

Q Have you been stationed in the Tucson sector all the time you've been with the Border Patrol?

A Yes, sir, I have.

Q And were you on duty—well, strike that.

I'd like to have you see a photograph that's in front of you on the stand. Do you see it there?

A Yes, sir.

Q Do you recognize what's shown in the photograph?

A Yes, sir, I do.

Q What do you recognize?

A It's a print that—that is like a print we have been following in the Babequivari Valley for quite some time.

Q Have you seen that pattern of shoe print before in the field?

A Yes, sir, I have.

Q When was the first time you saw it?

A The first time I saw it is on January the 4th, I believe, this year.

Q January 4th of 1977?

A Yes, sir, that is correct.

Q And would you tell us where you were when you saw it? Where did you first see it? Where was it?

[57] A The first time I encountered this type print was at approximately Milepost 119 at the little—what we call the Little Tucson Cattle Guard near Highway 86. At this point was the first time I saw this print, and I followed this print to Milepost 122.

Q Is this area shown on the chart in front of you marked Government's Exhibit 2?

A Yes, sir, it is.

Q Is the cattle guard shown on there?

A No, sir. The area of the cattle guard is, but—

Q Do you have a pencil with you?

A Yes, sir, I do.

Q Or a pen? Would you mark the location of the cattle guard?

MR. VELASCO: Could I approach the witness and see where he's marking?

THE COURT: Of course.

(By Mr. Mueller) Would you mark just above it here where I've placed a line and an arrow "cattle guard".

A Okay.

Q Describe to the Court what you did and what you observed on January 4th?

A Well, on January the 3rd—

Q First of all, you might want to tell us what you were doing out there and why you were there.

[58] A On January the 3rd, Pilot Akin came into the office and advised—

Q Which office are you talking about?

A At the Tucson Border Patrol office. And advised that—correction on that. On the 4th, the morning of the 4th, he requested help from the Tucson agents because on the prior day, the 3rd, they had followed a set of tan tracks, one with this type marking in it, and they had to abandon the tracks due to darkness somewhere south of this Little Tucson area. We went out—

Q Is the Little Tucson area on that chart?

A The general area, yes, sir.

Q Are the words "Little Tucson" on it?

A Yes, sir, it is.

Myself and Officer Doug Hunter went out to help the Casa Grande men and here, Pilot Akins, and he flew a general line of where the tracks were going, and we cut for the sign around this cattle guard around Milepost, it's right at 119, and that's where we initially found the tracks and started on the tracks from there.

Q What do you mean by "initially found them"?

A That's where we observed—first observed the tracks that they had described to us.

Q Tell us what you did and what you saw?

A We followed this group and observed that it was [59] staying just south of the highway and paralleling the highway in an eastward direction. Therefore, after, instead of walking the whole distance, we tried jumping ahead from sandwash to sandwash, and each time that we found the tracks then we would continue on to the next sandwash.

At approximately Milepost 122, I don't recall the exact place, but I was following the sign because it wasn't where we thought it should be. I was following it on foot and I also saw some old prints with this type of shoe marking in it.

Q What do you mean by "this type of shoe marking"?

A With this print design in the sole.

Q Would it help you if you referred to it as a chevron print?

A Yes, sir, it would. That's what we—some of the agents, including myself, referred to this man as Chevron, or as this, his print as the chevron print.

Q Go ahead and relate it.

A I didn't pay a whole lot of attention to this older group, other than the fact that this print was in it, but I did follow the other sign to a point where it came out at Milepost 122—

THE COURT: You followed the old prints until it came out at 122?

THE WITNESS: No, sir, this would be the freshest [60] sign that we had, that the Casa Grande units had had the previous day. At Milepost 122 the tracks led on to the highway. We cut for some distance both sides of the highway to make sure that they didn't go on across, and we couldn't find any evidence that this had happened, therefore we assumed that they had been picked up on the highway.

Q Okay. Was there any sign the men had been hiding or stopped in that area?

A No, sir, there had not been. At one point I followed I would guess about a mile on foot, and at any part of this time there was no sign of stopping.

Q How far off the highway were these tracks? In other words, how far from the highway parallel or the edge of the highway?

A From the highway itself I would guess about 50 or 60 yards, something around that area.

Q Could people walking at that distance from the highway have been seen from the highway during daylight hours?

A Yes, sir, very easy.

Q Based on what you saw from the tracks and how they were made, did you make a determination they were made during the daylight or during the darkness?

A Yes, sir. Our experience with aliens is for one thing that they will not walk that close to the highway [61] where they can be observed. Also while following this sign, it would come upon brush and gopher holes and things like that where they would immediately make a —sometimes even backing up to a slight extent and going around objects which we determined that this was being done in the nighttime hours, in the dark hours.

Q Why does that mean that to you?

A That these people on this particular day, we determined that they were being picked up in the dark hours?

Q Why did it mean—why did them coming up to something and abruptly going around it mean this was done during the darkness?

A Normal walking habits of people, in daylight hours they can see far enough in advance any object that's going to be in their way, therefore they more or less have a straight walk or more of a curved type to their walk around objects instead of abrupt changes.

Q Could you—did you notice where they had crossed any fences, any obstacles?

A On the 4th, no, sir, the only fence I observed that they crossed would be the fence between the highway and the—of where they were walking paralleling the highway.

Q Could you determine with regard to the old set you say you saw and the new set of tracks how many people [62] would be in the group, if there was a group?

A In the old set, sir?

Q Both sets.

A In the new set there was a group—it was ten. In the older set I didn't spend that much time with it, but I guessed about seven to eleven, somewhere along in there.

Q Did you make any estimates as to how long ago the new set and the old set had been made?

A Approximately a week, the older set.

Q What about the new set?

A It appeared to be a day or two old at this time, on the 4th.

Q The 4th was a what, a Tuesday?

A Yes, sir, I believe it was.

Q On the 4th had you received any information as to any point of origin of these tracks in the United States?

A Yes, sir. Later the Casa Grande unit and Pilot Akins and myself and my partner met at our trailer house which we have at Sells in the parking lot of Sells Law and Order, and in general discussion there we talked about this chevron and they advised that it was entering south of an Indian village called Itak.

Q Now, you described the prints that you followed which paralleled the highway going east for a few miles. [63] Did that mean anything to you or was there any significance to that to you with regard to your prior knowledge about techniques used by alien smugglers?

A Yes, sir. I had heard also of other—I didn't know at this time if this was—that this chevron involved in this type of operation or not, but I had heard of the aliens walking parallel to the highway until such time their pickup vehicle came by and I had heard that also the guide of the group of aliens would flash, give a signal with a flashlight to the driver, and they so worked their being picked up.

Q Was anyting found on Mr. Hernandez-Loera when he was arrested?

A Yes, sir, he had a flashlight and also spare batteries.

Q Now, the next time you found—well, when was the next time you saw this track again?

A It would be on the 16th of January of this year.

Q 1977?

A Yes, sir.

Q And where was that?

A On this date I started close to the Alvarez Mountains on the Topawa Itak road. I went in. I would also be west of Topawa on the Topawa Itak Road and that point is where I first observed this sign along with another [64] group of aliens.

Q Who were you working with?

A That day I—there was several agents out there but mostly with Officer Rayburn.

Q How did you and he work together?

A He worked north of me trying to cut the sign further north of me, while I started on the sign at this Topawa-Itak Road.

Q Well, what were you using for locomotion?

A Motorcycles.

Q All right. Go ahead and tell us what you did and what you saw.

A On starting tracks on the Topawa-Itak Road, immediately at the point of where I took off on the tracks they went through a wash that was real rugged, real brushy, where the road itself, had they walked 30 feet to the west they could have by-passed this real rugged, real brushy wash, which indicated to me at that time that at that point they were walking in the dark. I followed the sign on north. At one point I came upon a fence, an old fence that in places it was standing, in places it was completely torn down, and in other places the wire was gone. At one point all of the aliens passed through a fence that, had they stepped approximately ten foot to either side of it, they could have walked around the fence [65] where it was down, which also indicated at this point they were still walking in the dark.

I continued on the tracks. I don't know for sure because the speedometer on my bike didn't work, but approxi-

mately two or three miles, at which point I met up with Officer Rayburn and we continued on the tracks together.

Q Was there any indication from what you observed that any stops were made by this group?

A No, sir, none at all. At no point could we find where they stopped for a rest.

Q Did you make any determination as to the approximate size of this group?

A Yes, sir. I believe this group was fifteen. Fifteen or sixteen.

Q Did you make any estimate as to how far this group may have travelled?

A Yes, sir, we estimated approximately 24 to 27 miles. Part of it being that on Officer Rayburn's bike I believe he said he had 21 miles at the point where he and I started together to Milepost 122, or to Milepost, yes, I believe it was 122, to where he had the 21 miles.

Q Okay, did you make any estimates as to how long it would have taken this group to travel that distance?

A Yes, sir, we assumed, due to their straight line [66] marching type thing, which varies from the normal transcient alien that's not going to be smuggled, whereas a smuggled alien, they walk in direct lines or seen to walk in hard straight lines—

Q What does that mean to you if they do that?

A If they walk in hard straight lines—

Q What do you mean by a hard straight line, first of all?

A They, they seem to be guiding or noticing exactly where they're going or guiding on one particular point and heading straight for it, whereas we found in the average transcient alien—

Q What do you mean by a transcient alien?

A The aliens that we—that just cross the border and plan on walking until they find work. We find that these people will wander at times, they don't have any particular

point that they're heading on, and there paths will seem, will tend to vary back and forth. Whereas this group was more in a direct line walking like they were intending to hit a certain point. Which point I don't know what they were guiding on.

Q Did you notice any other tracks or trails while you were trailing this set of tracks?

A Yes, sir, we did. Different points, I don't recall how many times, but while on this set of tracks, [67] at one point I made a definite point to go over and take a look at them, which at this time the two groups were separated by approximately a hundred and fifty feet, at this point, I went over to look at them and it was a group of 13, and it also had the chevron print in the group, but it was older type sign.

Q Did you make any estimate as to the age of the track?

A I estimated five, five days to a week old.

Q Does the chart in front of you have any representation on it where it shows where you tracked these tracks on the 16th of January?

A Where I started, sir?

Q Well, does it show the trail that you followed?

A Yes, sir, roughly it does, yes, sir.

Q Would you describe for the Court how that's represented on the chart?

A Yes, sir, I made a dot type marking here.

Q What color is it?

A I did it in pencil, sir.

Q So it's a black dotted line?

A Yes, sir, gray, gray-black.

Q Gray dotted line?

A Yes, sir.

Q It starts out where?

[68] A It starts at the Mexico-United States border south of Itak.

Q And where does it go to?

A It goes to Milepost 122, Highway 86.

Q Parallels the highway between what mileposts?

A 119, roughly 119 and 122.

Q Did you track the tracks—you say you tracked the tracks up to the highway, is that correct?

A Yes, sir, we did.

Q Did you track to determine if they ever got off the highway?

A Yes, sir. We, Officer Rayburn and myself, on the 16th, worked together and we ran the highway approximately, the best I recall, nearly a mile or about a mile, and couldn't find any sign of their signs leaving the highway.

Q On both sides of the highway?

A Yes, sir.

Q Did you make any inferences from that?

A Yes, sir, that they were being picked up on the highway.

Q And did you make any inferences from their direction of travel of the foot traffic to the east with regard to what direction the vehicle may have taken?

A Yes, sir. We assumed that because the aliens [69] were walking in an eastward direction after hitting the highway that apparently the vehicle would be going in the same direction or that therefore, to myself there wouldn't be any need for them walking in an eastward direction.

Q Okay. Were you on duty on Sunday, January 30th?

A Yes, sir, I was.

Q About what time of day did you go on?

A I believe it was started at midnight between the 30th and 31st. I beg your pardon. I also worked the 30th, I also worked the 30th starting at Midnight of the 30th.

Q But you went on duty about Midnight between the day of the 30th and the 31st, is that correct?

A Yes, sir, I did.

Q And you were on duty during the early hours of the 31st of January, 1977?

A Yes, sir, I was.

Q Who did you go on duty with?

A Officer Ron Evans.

Q Ron Evans?

A Yes, sir.

Q And what were you going to do that morning?

A That morning, due to the fact that it was—the rains had cleared, we discussed it and decided that [70] we would set up in a position to observe tracks in an eastwest direction on Highway 86 to observe vehicles, because we both felt, and in our own minds we were sure that this was the night that this chevron print would bring his load through, this particular night.

Q Well, why did you believe that this was the night?

A The two prior times that I had had personally tracked was near the weekend, being on Sunday and one on a Monday. Also Friday, Saturday and Sunday previous to the 31st was rainy and inclement weather, which also in past experience we have not known smuggled aliens to be brought up in where they have to walk long distances in the inclement weather, therefore this 31st being clear with a good moonlight we set up in a position where we would watch traffic on Highway 86 in hopes of catching the vehicle transporting these subjects.

Q Where did you set up?

A Milepost 114, approximately, to Highway 86, just west of Three Points.

THE COURT: Just west of what?

THE WITNESS: Three Points.

THE COURT: Thank you.

Q (By Mr. Mueller) That would be to the east of Milepost 122?

[71] A Yes, sir, it would.

Q Is the point where you set up shown on the chart, Government's Exhibit 27

A No, sir, it's not. I could put an approximate point in there if you'd like.

Q Would you do that for me?

A Yes, sir.

Q How have you shown that on the chart?

A I've marked—I drew a circle with an X in the center with an arrow pointing to it, which above the arrow states "Milepost 114".

Q And that's where you and Agent Evans parked your vehicle?

A That is correct.

Q Why did you both stay at that area?

A Our first committment was to the Altar Valley, which would be the Sasabe area. That is where we were assigned and that was our first committment. We had to cover that area.

Q Where is that located in relation to the area on this chart?

A It would be straight south of Three Points, which all of this area from the highway down to Sasabe—

Q Is Three Points shown on that chart?

A Yes, sir, it is.

[72] Q What is Three Points?

A It's just a Y in the road.

Q Intersection?

A Highway 86 and 286.

Q And which road leads to the Altar Valley?

A Highway 286.

Q Is that to the east of the Babequivari Mountains?

A Yes, sir, it is.

Q Okay. So, you had a primary responsibility to cover what out of that area?

A All of the Altar Valley was our primary responsibility where we were assigned.

Q Any other reasons why you set up at that point, at Milepost 114?

A You mean other than to cover Altar Valley?

Q Why did you both stay there at that point?

A Regulation requires that both officers be together at all times, especially working at night, both officers have to be together, especially in making a stop or anything like this.

Q Is there anybody else on duty who you were working with?

A There was a man working in town. I don't remember if there's one or two.

Q In which town are you talking about?

[73] A In Tucson.

Q Was there anyone else out on the highway at that point?

A No, sir, there was not.

Q Why not?

A Lack of manpower. We're fairly short of manpower. Therefore, usually only two men are assigned to the Altar Valley.

Q You said you felt this was the night the chevron track would come through again. Did you anticipate any particular time for this happening?

A Yes, sir, we did. We knew it would, or according to what we observed in tracking, we knew that they were getting onto the highway or being picked up in the dark hours. On the 4th when I was down there, and also on the 16th when we tracked them, we observed all of their walking was done in the dark hours, or from the point at which we started on them which was just a short ways from the border. Walking time itself we figured about approximately two and a half to three miles an hour, which mandated that it would be at least eight to twelve hours walking time, therefore if indeed they crossed at dark ap-

proximately six or so, then it would be approximately two to six in the morning when they would be picked up.

Q Did you expect to find them travelling in any [74] particular type of vehicle?

A Well, sir, it was our feeling, we were sure we were dealing with a professional—

Q Why was that?

A Due to the repeated trips and the large groups being brought up. Therefore, we were looking for a vehicle that could easily hide, we figured, eight to twenty aliens. A vehicle that, with this many people in it, wouldn't draw attention from any law enforcement.

Q What do you mean "wouldn't draw any attention"?

A Which wouldn't make law enforcement agents suspicious seeing large numbers of people in that given vehicle, therefore we were looking for a van or pickup, camper shell or U-Haul track, something of this nature.

Q Did you believe you would see the people in the vehicle?

A No, sir, we didn't.

Q What did you—well, what other kinds of vehicles? Any motor home, would that have been—

A Yes, sir, we had information that motor homes in the past, trailers. I'm sure there's others. I can't think of them right offhand.

Q What kind of vehicles did you actually see?

THE COURT: When?

Q After you went on duty. What time did you get [75] at milepost 114?

A Approximately 1:00 a.m.

Q 1:00 a.m.?

A Yes, sir.

Q What kinds of vehicles did you actually see on that day?

A We saw—

Q January 31.

A —cars, pickups with no camper shells. We saw, if I remember correctly, a couple of linen trucks and semi-tanker trucks.

THE COURT: A couple what kind of trucks, linen?

THE WITNESS: Yes, sir.

THE COURT: l-i-n-e-n?

THE WITNESS: Yes, sir.

Q (By Mr. Mueller) Will you explain that to us?

A Like in fact I believe it was in fact Haskell Linen trucks, the laundry trucks.

THE COURT: And you mentioned some other kinds.

THE WITNESS: Yes, sir, we saw some—the semi-trucks, the tanker type trucks.

THE COURT: Tanker, you mean carrying milk or oil?

THE WITNESS: That type of truck, sir. We didn't pay any attention what its cargo would be.

[76] THE COURT: Were you looking at trucks only going in one direction?

A No, sir, we were observing traffic in both directions. The reason we were watching for the traffic in a westbound direction was for—to get possibly an idea of the vehicle and the time it took to see if it did come back by our location.

Q What do you mean by timing it?

A At this time—well, we were set up at Milepost 149, and we knew we were 20, 25 miles roughly away from what I had known as the pickup area before, therefore we figured a good hour and a half or so from, if a vehicle did pass our location, to where it could get down in this area, make the pickup, then come back by our location.

Q Did you see any vehicle—well, how many vehicles did you see going from east to the west during the time you were parked?

A I didn't count them, but I guess 15 to 20 vehicles.

Q And did you see any vehicles at all which fit what you considered to be the proper type of vehicle for this operation?

A Yes, sir, we did, at approximately 4:30 we saw a pickup and camper shell.

Q Is that the only one you saw?

A No, sir, we saw one other with a pickup and [77] camper shell. During this period of time that was the only two vehicles that we considered likely for a pickup.

THE COURT: In other words, you're saying you saw two pickup with camper shells between the hours of 1:00 and what?

THE WITNESS: Well, from the time we made the stop, Your Honor, which would be about 6:12 I believe was the time we made the stop.

THE COURT: From 1:00 to 6:00?

THE WITNESS: Yes, sir.

Q (By Mr. Mueller) When did you see the first pickup truck with a camper?

A Approximately 4:30.

Q And did you notice anything about it when you first saw it?

A Yes, sir, Officer Evans and myself had worked it out where if we would, were going to ID a vehicle I would move closer to the highway, as close as I could get without being seen, and I would try to get the license number and he would try to get the general description of the vehicle itself. On this particular one at 4:30, I could get the partial of the license plate, which would be GN88, that's all I could get.

Q Was that an Arizona plate?

A Yes, sir, it was.

[78] Q Do you recall what the vehicle looked like?

A I couldn't give a good description of the vehicle itself because I was concentrating mostly on the license plate,

although Officer Evans tried to get the best description he could as far as pickup and camper shell and what have you.

Q And what, you don't remember what color it was?

A No, sir. In the darkness hours you could only tell if it was a lighter shade or a darker shade.

Q There were no headlights on the vehicle that you saw? No headlights of another car?

A No, sir, it came by itself.

Q And then when did you see this second pickup with a camper?

A Approximately 15 to 20 minutes later. It was about ten til five that morning.

Q Okay, did you make any calculations as to when you might expect one of these back if it did what you thought it would do?

A Yes, sir, we did. Like I said before, approximately, we figured, an hour and a half or in that vicinity.

THE COURT: I'm sorry to interrupt. That's two pickups with campers on, they were travelling in which direction?

THE WITNESS: In a westbound direction, sir.

[79] THE COURT: Both were going west?

THE WITNESS: Yes, sir.

THE COURT: Thank you. I interrupted you when you were going through some calculations.

THE WITNESS: Like I said, we calculated approximately an hour and a half from our position at a normal rate highway speed to this area, to load the aliens and then to come back by our position.

Q And what speed were these two pickups with campers travelling?

MR. RINALDI: Could we have some foundation for that, your Honor?

THE COURT: Foundation? You mean that he is a scientist of some kind?

MR. RINALDI: Well, that he is able to determine one way or another, has any experience in that regard.

Q (By Mr. Mueller) Have you based on your experience—

THE COURT: You don't have to do this. My Lord. How fast did you say they were each going, if they were going the same, first one was going how fast, in your opinion?

THE WITNESS: We just guessed, your Honor, an average highway speed of approximately 50, 50 miles per hour.

[80] THE COURT: Each were going 50, 55?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q (By Mr. Mueller) After you saw this last vehicle at about 4:45, ten minutes to five, did you see any other vehicles?

THE COURT: Going west?

Q (By Mr. Mueller) Going west or east?

A I'm sure there was some other westbound vehicles, like I said there were none that fit our description, or descriptions we were looking for.

Q During the time you were at this place on this period of surveillance, how many cars came from the west and went to the east?

A There again we didn't keep count. I could only guess approximately six, eight or ten, something like that.

Q Did you see either of these two vehicles again?

A Yes, sir, we did. The first vehicle that passed our position at approximately twelve after six again passed our position in an eastbound direction.

Q In the opposite direction you first saw it?

A That's correct.

Q And this was approximately an hour and a half after you had seen it going to the west?

A Just a little over an hour and a half, yes, sir.

[81] Q And what did you do then?

A We fell in behind the vehicle.

Q Did you check the license number?

A That is correct.

Q What did you determine from looking at it?

A We determined that it was—we were sure it was the same vehicle because of the GN88.

Q What was the actual number, do you recall?

A GN8804, I believe, was the full license plate number.

Q N for Nora?

A Yes, sir, Gulf Nora 8804.

Q What happened then after you verified the license number.

A Then we turned on our emergency lights and stopped the vehicle.

Q Did you have any belief at that time as to what was in that vehicle, as to who was in it?

A Yes, sir, in our own minds we knew it was the right vehicle.

Q Know what?

A There was no doubt in our minds this was a smuggling load.

Q Any particular one?

A Yes, sir, We—there again in our own minds we [82] knew that Chevron would be in this group.

Q All right. You turned on the lights and then what happened?

A The vehicle pulled over and before we could get completely stopped and clear the vehicle, the driver got out and hurriedly approached towards us. At this same time the curtain on the rear window of the camper shell was pulled back just a little bit like someone was looking out.

Q Could you demonstrate for the Court what you mean by that? What did you see occur?

A The corner looking at it from the rear, it would be the left corner of the curtain was picked up and pulled back to the right, and then it was quickly released.

Q Did that—did you draw any inferences from that?

A Yes, sir, a couple. For one thing, we knew that somebody was in the back, and apparently by it being released quickly they didn't want us to see them for some reason or other.

Q And did you get out of the vehicle, your vehicle?

A Yes, sir, I did, and approached the driver.

Q And what did Agent Evans do?

A He stood by the patrol car, as it's policy more or less that we have a man stay back as a safety precaution.

Q Was this a marked vehicle you were driving?

[83] A Yes, sir.

Q What kind of a vehicle was it?

A The make, sir?

A No, well, was it a sedan?

A Yes, sir, it was, with a full red lights and siren.

Q Wasn't a four-wheel drive?

A No, sir.

Q And had the Border Patrol colors and insignia on it?

A Yes, sir, it did.

Q Were you and Agent Evans in your uniform?

A Yes, sir, we were.

Q Were you carrying your pistols, revolvers?

A Did we have them with us?

Q Did you have them on your person in the holster?

A Yes, sir.

Q When you got out of your vehicle did you draw your revolver?

A No, sir, I did not.

Q Did Agent Evans have any weapons drawn of any kind? To your knowledge?

A To my knowledge, no.

Q Did you see him pointing a weapon at anyone?

A No, sir, he did not.

[84] Q Where he was standing at the car?

A No, sir.

Q Did you have the lights of your vehicle turned on after you stopped this truck?

A Yes, sir, we did.

Q And you approached the truck, what happened then?

A Well, as I stated previously, the driver approached us rather hurriedly and I met him at the back of the pickup, or in the vicinity near the rear of the pickup, and I identified ourselves as immigration officers, Border Patrol, and told him it was an immigration check and asked him if he was an American citizen. He stated that he was. His manner of speech was rather shakey. Also it was, well, at this point I asked him if anybody was in the back of the pickup, and he hesitated momentarily and stated yes, he said I, not quoting him, but he stated something to the effect that he had picked up some hitch-hikers and at this time he opened up the back of the camper shell.

Q Did you ask him to do that?

A No, sir, I didn't.

Q He did it without any question?

A Yes, sir, he did.

Q Did you have a gun drawn, pointed at him at that time?

[85] A No, sir, I didn't.

Q Had you made any body search of him at that time or shortly prior to that?

A No, sir, I hadn't.

Q What happened after he opened the back of the camper?

A I observed the bodies, some bodies laying in the back of the pickup, and I determined alienage, illegal alienage.

Q How many were there?

A Six. And therefore at this point I placed the driver under arrest.

Q And was anyone else found in the vehicle?

A Yes, sir. After I had handcuffed the driver, then Officer Evans walked up to the passenger side of the truck and observed another subject sitting on the passenger side. He opened the door, he established illegal alienage on him, and at this time he looked at the footprint, or at the shoes, and it was the chevron print that we were looking for.

Q Same as in the photograph in Exhibit 1?

A Yes, sir, that is correct.

Q And there was a subsequent search of the person who was a passenger in the passenger compartment?

A Yes, sir, there was.

[86] Q Is that when the flashlight and batteries were found?

A No, the flashlight and batteries were found at the office. He had a backpack, a green-colored backpack. We were concerned with the safety, being out on the highway at this hour of the morning and didn't want to conduct a full search at this point. We just secured the driver and the rider with handcuffs, transported them to the office, and then at the office we searched the backpack and found the flashlight.

Q Where did you first see the backpack?

MR. VELASCO: Objection, your Honor, it's not relevant to the stop.

THE COURT: I can't tell.

THE WITNESS: The backpack was up front in the front part of the pickup.

Q (By Mr. Mueller) Did you identify if any of the people who were in the truck were in the courtroom today? Did you identify anybody who might have been in that truck?

A Yes, sir, I recognize Mr. Loera, Mr. Hernandez. The other man I'm sure is him without the beard.

THE COURT: I'm sorry, you identified Mr. Loera?

THE WITNESS: Mr. Hernandez-Loera.

THE COURT: What does he look like?

[87] A He's the man in the green shirt with the mustache.

THE COURT: Then you said somebody else.

THE WITNESS: Mr. Cortez.

THE COURT: You said something about a beard.

THE WITNESS: Yes, sir, I don't recall the beard.

THE COURT: But is your recollection that Mr. Cortez is in the courtroom?

THE WITNESS: Yes, sir.

THE COURT: With a beard?

THE WITNESS: Yes, sir.

THE COURT: Anything else you can tell me about him?

THE WITNESS: He has a pink, light pink, to me, jacket on.

THE COURT: And who was he, the driver or the passenger?

THE WITNESS: He would be the driver, sir, Mr. Hernandez would be the passenger.

THE COURT: Thank you.

MR. MUELLER: That's all I have, your Honor.

THE COURT: Shall we have a short recess now?

MR. VELASCO: Yes.

(A short recess was taken.)

[88] **CROSS EXAMINATION**

BY MR. VELASCO:

Q Officer Gray, you indicated that on January 4th you saw a footprint resembling the chevron print at the Little Tucson Cattle Gate. Was that correct? Am I correct in as-

suming you also tracked that chevron from the cattle gate to the Little Tucson?

A No, sir, to Milepost 122.

Q Okay. And you never—that chevron then did not go south from the cattle gate into Little Tucson?

A No, sir.

Q You said that the aliens, whether they were people that were travelling from south to north, in your backtracking you saw them going up a wash that was pretty hard to negotiate?

THE COURT: Excuse me, are we talking about the night of the 16th?

MR. VELASCO: The 16th, yes.

THE COURT: Yes.

Q (By Mr. Velasco) On the night of the 16th you said you saw some tracks going north on a wash that was very hard to negotiate, is that correct? Sir, you stated backtracking. Why do any backtracking? Did you track forward?

A Yes, sir.

Q In your tracking forward, if there was a wash, [89] it was very hard to negotiate, where if they had moved a few yards over to the right or left they could have used a road, is that correct?

A If they had moved to the left.

Q They would have a more easy time of travel, is that correct?

A Yes, sir, much easier.

Q Now, would this—is this a well-travelled road?

THE COURT: Which is the well-travelled?

Q (By Mr. Velasco) Is the road or path you said they could have followed?

A I don't know how well-travelled it is, sir. It's easily identifiable.

Q Let me ask you this. Can you see a vehicle, if you're on that road, can you see a vehicle—

MR. MUELLER: I object to the characterization of a road.

Q (By Mr. Velasco) Is it a road?

A Yes, it's a road.

Q And vehicles can travel on that road?

A Yes, sir, they can. In some places it appears a four-wheel drive would be better.

Q A person on the road, would they be able to see a vehicle before the vehicle saw them, or the people in the [90] vehicle would see them?

A On this particular road?

Q Yes.

A Yes, sir, I believe they could.

Q Given this information, would you say that the persons using the wash would not be acquainted with the area?

A No, sir.

Q Are you saying, sir—

MR. MUELLER: Your Honor, I object to interrupting the answer, sir.

THE COURT: Have you finished?

THE WITNESS: Yes, sir, I guess.

Q (By Mr. Velasco) You're saying then a person familiar with the area would not travel along the road, but would rather go into the rough brush and beat their way north?

A You're talking about this road in daylight hours would easily have been seen. Nighttime hours it would not have been seen, beg pardon.

Q Would a person familiar with the area be able to find that road?

A It's an east-west road.

Q Doesn't go north-south at all?

A I guess at points it might angle northeast or [91] northwest or something, but it's not a north-south road.

Q So you're saying then that really then the only way to go north is up that wash?

A It makes an angle type, yes, through the wash.

Q So the road is of no use then to a person going north?

A No, sir, that particular road, no vehicle, no.

THE COURT: Excuse me, for a vehicle you mean?

THE WITNESS: For a vehicle, no, sir.

THE COURT: No, I don't know whether Counsel was talking about a vehicle, you're saying it would be of no use for a vehicle.

THE WITNESS: Not for north-south vehicle direction, no, sir.

THE COURT: Is that what you're talking about?

MR. VELASCO: I'm asking if it would be any use for a person travelling north and south, would that be used?

THE WITNESS: It's an east-west.

Q (By Mr. Velasco) So when you said they could have used the road they really couldn't have?

A Through this particular wash, yes, they could have.

Q All right. We'll let it go at that. You indicate there's two kinds of aliens. Those that are going on a shall we say a forced march from Point A to [92] Point B and you characterize those people as people that walk in a determined manner in a determined direction.

A Yes, sir.

Q Then you said there were other kinds of people who just sort of wander on their way north, is that correct?

A Yes, sir, I did.

Q So are you saying then that, and I seem to get the idea that you said that people who are going as a group being guided by someone would not take the roads; in other words, they would avoid the roads, is that correct?

A Yes, sir, they would avoid the road, and you—

Q And they would go in a very straight direction, or would seem to have some definition?

A Which was walking straight, sir, I also had previous testimony they would go around, in daylight hours, people go around hard obstacles.

Q I'm not arguing with the particular movement of obstacles, I'm talking about their heading.

A Yes, sir.

Q People that are being guided you say travel with a definite line you can predict where they're going, is that correct?

A Yes, sir.

Q And you seem to say that the people that are just out there on their own will wander a little bit more.

[93] A Yes, sir, that is correct.

Q Are you saying then that the people that just wander by themselves don't know how to navigate on land?

A No, sir, we're saying that the people not familiar with the particular area, the indecisiveness of where they're going exactly will have a tendency to wander to some degree.

Q Are you saying then that in this area there are no market noticeable trails?

A No, sir, there's not definite trails in this particular area.

Q Okay. Now, isn't it—am I correct that when you followed this track, all these tracks on whatever days you were out there, did you do it on a motorcycle at all times?

A Yes, sir, there was—

Q And isn't it true when you're travelling on a motorcycle you're going at a fairly rapid pace compared to a person that would be walking on the trails, isn't that correct?

A Compared to a person walking, yes. At times, but also at times I move the motorcycle very slowly, depending on how easy it is to find the tracks.

Q And you're saying that in the 27 miles that these people walked or however many miles these people [94] walked, they never stopped?

A That is correct.

Q Just one straight forced march?

A That is correct.

Q And you say that without any reservation although you didn't walk the course yourself?

A At this point we followed, I would very—at no point from the time we started 'til Milepost 122 could we find a point where they stopped for a rest.

Q And this is from your observation on the cycle?

A That is correct, sir.

Q Am I correct also in assuming—and this is on the 31st, the day the vehicle was stopped—you didn't stop or didn't wait for the second vehicle to come by or see if it would come by, did you?

A No, sir, we did not, there was a 15 to 20 minute separation between the two vehicles.

Q So it was your intention, was it not, to stop this vehicle, the first vehicle that came back, and search it, is that correct?

A Yes, sir.

Q And then if that vehicle contained nothing it, you would stop Number Two vehicle if it came by, isn't that correct?

A Given this particular time period, yes, sir.

[95] Q So it was your intention then to stop every vehicle that went west and returned east—

THE COURT: He didn't say anything, about every vehicle, Counsel.

Q (By Mr. Velasco) Well, let me rephrase the question. It was your intention to stop what you earlier described as suspicious vehicles that would head west and then return east, is that correct?

A Capable of hauling the aliens, the number of aliens we had pre-determined, yes, sir.

Q So that was your plan, is that correct?

A Our plan was to, yes, to stop the vehicles in this given period of time because we had no prior information as to the type of vehicle.

Q So if you would have seen at that time, during that time frame, your time frame of between 2:00 and 6:00 o'clock, if you had seen a van, a truck, a truck with a camper shell and a motor home, a trailer, all these vehicles, go west and return east, you would have searched every single one of them?

THE COURT: Within the time frame, Counsel.

MR. VELASCO: Within the time frame.

THE COURT: You didn't add that.

MR. VELASCO: That's what I meant to say.

MR. MUELLER: I object to the speculative nature [96] of it, anyway.

THE COURT: I'll allow it in. Would you agree or not?

THE WITNESS: Sir, that, you're saying had we observed it going west and then back east?

Q (By Mr. Velasco) Yes.

A In this time period?

Q Yes.

A Yes, sir.

Q You would have searched every single vehicle that did that, right?

A Had they been capable of hauling this amount of aliens well hidden, you bet.

Q With respect to the unsuspicious vehicle that—you determined there was a profile, did you not?

A To what sir, in the vehicle?

Q For the vehicles that you would stop.

A Yes, sir.

Q And your profile was based in part upon the number of people you calculated were walking on this route, isn't that correct?

A In what respect, sir?

THE COURT: He says the profile of the car that you had in mind had a relationship to the number of people that you determined had previously used and made these [97] marches?

THE WITNESS: Yes, sir, that is correct, and to the number of aliens, we figured eight to 20.

Q (By Mr. Velasco) In other words, you figured there would be eight to twenty aliens coming through that route at one time?

A This is what we had observed in the past. We hadn't observed any less than eight, no more than twenty.

Q Let me ask you this, sir. In your experience as a Border Patrol agent, are you familiar with the technique where aliens are sometimes in a sedan, placed in the trunk of the vehicle and also in the vehicle itself?

MR. MUELLER: I would object, your Honor, it's irrelevant in this case because based on his prior—

THE COURT: I think it's outside the scope of what we're talking about, sometimes they come across singularly and not in automobiles at all, I guess. Whether they were in automobiles, the top of the engine or in trunks seems to me, Mr. Valesco, doesn't quite fit into the profile he's talking about.

MR. VELASCO: Yes, your Honor, the point is that I am trying to show—

THE COURT: Be my guest, ask him.

Q (By Mr. Velasco) Have you heard of it?

A Yes, sir, I've even heard of them on bicycles.

[98] Q The point is then you could put eight people in a sedan?

A With some difficulty, but there again you're drawing suspicion to some degree.

Q It has been done?

A It has been done.

Q But you determined not to stop that type vehicle?

A Yes, sir, we did.

Q Am I correct, also, in assuming that no one was stationed to the west of Sells?

A That is correct, sir.

Q No Border Patrol agent was stationed to the west of the pickup point?

THE COURT: Is this for the purpose of some plan of your own, or with regard to the time frame or what? I have a suspicion it relates to whether you're going to put on testimony or not. Anyway, I'm just suspicious, you may ask, go ahead, nobody else objected. Do you have anybody at Sells looking?

THE WITNESS: No, sir, we were the only two agents looking.

Q (By Mr. Velasco) From Three Points to Sells, what's the distance?

A Sells is approximately, sir, I think Milepost 113, and Three Points is approximately 150, somewhere [99] along in that area.

Q 150?

A Yes, sir.

Q And the distance is?

A Between 35 and 37 miles, something like this.

Q A vehicle then could travel from Three Points to Sells and back to Three Points within the hour and a half you allotted yourself?

MR. MUELLER: Your Honor, it could be faster than that.

THE COURT: Yes, he could do it, I suppose somebody could run it even.

MR. MUELLER: I object to the form of the question.

THE COURT: Well, I'll allow it, Counsel, because when defendants want to do something the rule is they should be allowed. That's the Ninth Circuit Rule.

All right, Mr. Velasco.

THE WITNESS: Yes, sir, it's possible the vehicle could do that.

Q (By Mr. Velasco) And in your calculation, sir, you had estimated an hour and a half, and the first vehicle you stopped in fact had come through an hour and forty minutes later, had it not?

A That would be correct, sir, in that.

[100] It didn't come in within the time frame you expected it, did it?

A Yes, sir, because we were looking for about an hour and a half.

Q Would you have stopped the vehicle if it would have come by two hours after you first observe it?

MR. MUELLEN: I object on the grounds of speculation.

THE COURT: Speculation, Counsel, yes.

Q (By Mr. Valasco) When you stopped the vehicle and you told the driver this was an immigration check—

THE COURT: The vehicle had come out—the driver had come out and came toward him when he asked him?

MR. VELASCO: Yes, your Honor.

THE COURT: I thought you said that the driver was in the car.

MR. VELASCO: No.

Q When you had this discussion with the driver and you told him it was an immigration check, did you mean by that that you wanted to check his documents?

A I had to establish alienage of him until such—

Q You were stopping the vehicle, were you not, to search it?

A To establish alienage of the occupants, visible occupants.

[101] Q Of the visible occupants?

A Yes, sir, that is correct.

Q Prior to stopping the vehicle did you see any occupants?

A No, sir, we didn't. And upon the stop is when we saw the curtain move.

Q You didn't know who was in the vehicle at all?

A No, sir, we didn't.

Q So you didn't know, you didn't have any reason, when you saw the vehicle go by, to suspect that the driver was an American citizen, Canadian citizen, Mexican citizen, Mexican-American?

A No, sir, we couldn't tell due to the darkness.

Q Could you describe the second vehicle that went by there, that you thought fit into your profile?

A I couldn't give you a real good description, no. I was looking mere for the license plate.

Q Do you recall that license plate?

A No, sir, the license plate number was out—or light, correction.

THE COURT: I'm sorry, the second vehicle license plate was out?

THE WITNESS: License plate light, your Honor.

THE COURT: Was out?

THE WITNESS: Yes, sir, it was not burning.

[102] Q (By Mr. Velasco) Which made it more difficult, would have made it impossible to determine if that was the same vehicle, would it not, in terms of registration?

A That is correct.

Q Was that suspicious to you?

A Yes, sir, it was.

Q You said that when a vehicle came by about and 42 minutes later you fell in behind the vehicle and you said you felt sure it was the same vehicle. Is that an accurate statement of your state of mind at the time?

A Yes, sir. I stated, if I remember correctly, in our own minds we knew it was the same vehicle.

THE COURT: You said he used a different phrase. Are you taking it from a report or from what you recall the man testifying to?

MR. VELASCO: From what I recall him testifying to.

THE COURT: All right, go ahead.

Q (By Mr. Velasco) So now you say—

THE COURT: Not now.

Q (By Mr. Velasco) At this time, at the present time, you felt it was the same vehicle?

A Yes.

Q You felt that way even though you didn't have a complete license plate number on the vehicle, isn't [103] is that correct?

THE COURT: That's where he said "felt" and not "sure".

Q (By Mr. Velasco) And similarly at this time you don't have an accurate description other than it was a pickup with a camper shell and it was light or dark in color, isn't that correct?

A That is correct. The height of the camper shell in relation to the cab of the pickup, and like I said, the two letters and two numbers of the license plate itself.

Q Do you have any idea how many vehicles might have those—

THE COURT: Those what?

THE WITNESS: Of what, sir?

Q (By Mr. Velasco) Those numbers, the numbers that you had in your knowledge, that you had available to you.

A The GN88?

Q Yes.

A No, sir, I don't have any idea at all.

THE COURT: Am I going to hear evidence as to how many Arizona issued with these?

MR. VELASCO: No, your Honor.

THE COURT: No.

[104] Q (By Mr. Velasco) With respect to the flashlight that you make reference to, did you state what the purpose of the flashlight was?

THE COURT: What the purpose of that flashlight was?

Q (By Mr. Velasco) Yes, if a flashlight was in this operation.

A No, sir, I did not state what this flashlight was for.

THE COURT: I don't think Counsel meant that, you didn't mean this one?

MR. VELASCO: I would rephrase the entire question.

THE COURT: Yes.

Q (By Mr. Velasco) When you watch, your line cutting and tracking of this trail, there was nothing there that indicated a flashlight was used, was there?

A No, sir, there wasn't.

Q And am I correct or would it be fair to say that the fact that a person walks west to east doesn't really indicate that the person desires to go east, does it?

THE COUNT: You mean at the moment he's walking or when he stopped or smokes?

Q (By Mr. Velasco) No, in the eventual direction, [105] if they travel at night?

A I don't suppose it would be conclusive they're going east, no.

Q So it would be possible, it would be fair to say, would it not, that a person walking west to east at night—

THE COURT: In the desert.

Q (By Mr. Velasco) In the desert on this highway or off the highway would be doing so he could keep an eye on a vehicle travelling east to west or look for a vehicle travelling east to west?

A No, sir, that doesn't make much sense to me. If they're going eventually going to go the opposite direction, why—

Q Let me ask you this. When you're walking west to east, you can see things coming east to west, can you not?

A That is correct.

Q But if you are walking east to west, to see things coming from that direction, travelling that same direction, you have to turn around, would you not?

A That is correct.

Q Officer, you predicated your belief that the vehicle would come by about 2:00 or 6:00 o'clock in the morning upon an estimate that the vehicle—or that the [106] aliens or any persons that would be picked up would start travelling around 6:00 o'clock, isn't that correct, 6:00 o'clock in the evening?

A This was about the time at this time that it was getting dark, approximately 6:00 o'clock.

Q Now, if the persons had started travelling 3:00 or 4:00 o'clock in the afternoon, isn't it possible then that the people could have been at the highway between 11:00 and 3:00 o'clock?

A Well, sir, it had been established—

Q Well, answer that question, would you please?

MR. MEULLER: I object, it's irrelevant.

THE COURT: Maybe Counsel is going to introduce evidence that some people left at 3:00 o'clock. I don't believe he is, but maybe he is, I'll allow it. As I said, under the rule, ask the question. If they left at 3:00 in the afternoon they would arrive—

Q (By Mr. Velasco) Wouldn't they arrive somewhere around 11:00, a little after Midnight?

A Yes, sir, it's possible with this—

Q And no one was on duty between 11:00 or 1:00 o'clock, were they? Near the Three Points area?

A No, sir.

Q You don't know what happened at that area, do you?

[107] A No, sir, I don't have any idea.

Q And to your knowledge there was no observation of this route on that date, was there?

A On this date?

Q Yes.

A No.

Q So it was merely a belief on your part that there might be some traffic concerning that.

THE COURT: Oh, he added other things to that, Counsel. He told us about the moon, told us it would be at night, had been raining lately, and a lot of things. I don't suppose they cross in the daytime, anyway, do they? Do aliens cross the border in the daytime in large quantities?

THE WITNESS: Yes, sir, the transcient aliens.

THE COURT: No, I mean groups of seven to twenty, fifteen. Have you had experience with that.

THE WITNESS: There has been experiences, yes, of other smuggling cases that have come in the daylight hours, but not to my knowledge in this area.

THE COURT: Thank you.

MR. VELASCO: I have no other questions.

[108] **CROSS EXAMINATION**

BY MR. RINALDI:

Q I know the Judge has been here awhile, but can you tell me what Sells is, just so the record reflects what kind of a community Sells is?

A It's an Indian village, small Indian village.

Q Would you agree with me that Sells is the largest single settlement on the Papago Reservation, Indian settlement?

A To my knowledge of the reservation. I'm not that familiar with all of the settlements there.

Q But it is—would you agree with me it's the center of their tribal government?

A There again, sir, I don't—I'm not involved with the Indians, so I don't know.

Q Do you know of any larger settlements on the Papago Reservation?

A No, sir, not to my knowledge.

Q If I follow this road out, the highway, I come to Ajo, is that correct?

THE COURT: Follow what road, Counsel?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) 86 going west.

A Yes, sir.

Q Is Ajo also in Pima County?

[109] A I don't know, sir, I haven't been over there.

Q Is there any other major arteries between Tucson and Ajo that you know of?

A No, sir. You mean another route?

Q That is correct.

A No, sir, I don't.

Q This is the main road between Ajo, Arizona, and Pima, Arizona—or Tucson, Arizona?

A Yes, sir, to my knowledge.

Q Likewise this is the main route between Sells and Tucson, Arizona?

A That is correct.

Q Now, you indicated that—well, were you observing traffic on the nights of the 28th, 29th or 30th of January?

THE COURT: On?

MR. RINALDI: The 28th, 29th or 30th of January.

THE COURT: Yes, observing traffic on I-10?

Q (By Mr. Rinaldi) No, no, observing traffic at the same spot you observed traffic there at Three Points on January the 31st.

A Sir, I've never before gone over there to set up to observe traffic on Highway 86 prior to this night.

Q Did you have occasion to outline or do any tracking in the area of the route followed by the chevron [110] truck on the days of January the 28th, 29th or 30th?

A No, sir. It was raining those day. Or inclimate weather.

Q You have no way of knowing then whether smugglers or the chevron-shoed individual came through the Papago Reservation along his normal route on any of those days, do you?

A Do I have knowledge of that?

Q Yes.

A No, sir, I don't.

Q And there's no way you could tell because you never went out there to observe, did you?

A There's prior experience knowing—

Q Well, answer my question, sir, I—

A No, sir, I have no knowledge whether he came up there those days.

Q Would you agree with me he could have come up through that area with a load of aliens any one of those days?

A It's possible, yes, sir.

Q Now, you indicate that you were checking the Altar Valley Road, is that Correct, and that was your primary source of concern on that evening?

THE COURT: Is there a road there? I thought it was a valley.

[111] Q (By Mr. Rinaldi) Well, the Altar Valley, I'm sorry, the road to Sasabe Junction, is that correct?

A The Altar Valley, that leads into the Altar Valley.

Q Perhaps you could draw us a picture of the Three Points area and show us where the Altar Valley is in relation to the position where you—

THE COURT: Why don't you draw it and ask him whether it's a fair representation.

THE WITNESS: It's on the map, sir.

THE COURT: He said it's on the map.

THE WITNESS: Three Points and here's the Baboquivari Mountains.

Q (By Mr. Rinaldi) Now, you indicate you were at Milepost 148, is that where you were?

A 149.

Q Fine, how far is 149 from the junction of Highway 286 with Highway 86?

A Approximately a mile, a little over a mile possibly.

Q So you were one mile to the west of Three Points, is that correct?

A That is correct, sir.

Q How were you able to observe the traffic coming up Highway 286 to Highway 86 if you were one mile to the [112] west of the junction?

A For one thing, sir, this sets up in a little higher elevation and you can easily see vehicles, especially in the last few miles, of this highway.

Q So when you say you can see them, you can see their headlights, can't you?

A For—yes, sir.

Q But you can't tell if they're trucks or they're cars, all you can do is tell there's a vehicle?

A Well, sir, without disclosing our classified information as to a sensor field, we can also know of vehicle movements in the Altar—in the southern part of the Altar Valley without being in the area itself.

Q Well, if a rancher, for example, say the King Ranch, you know where that is?

A Yes, sir.

Q If a rancher from the King Ranch, which I believe is just to the south of Highway 86 on 286, is it not?

A Yes.

Q If a rancher were to come up that road at night would you be able to tell whether he was driving a truck or whether he's driving a car or who he was or identify him in any way other than knew there was somebody on the road?

[113] A Of course not, sir.

Q Now, a linen truck went by you, is that correct?

A I think one or two or three of them, sir, I don't recall.

Q Do you know what time the linen trucks went by?

A No, sir, I don't have any idea.

Q Did you take their license numbers?

A No, sir, I didn't.

Q Would I be correct in assuming a linen truck is the type of truck that could carry between eight and 20 aliens without raising suspicion?

A It could, sir.

Q Were you in any way suspicious of the linen trucks?

A No, sir, not to that extent, no, sir.

Q Did you time the linen trucks?

A No, sir, we didn't.

Q Do you know if the linen trucks came back?

A I have no idea.

Q You don't know what time they went out and you don't know if they came back, but they could have been carrying aliens or they were capable of carrying aliens?

A Yes, sir, they could have.

Q Do you know—well now, you determined that on the 4th of January, someone had come up to Highway 86 [114] and had reached Highway 86 approximately Milepost 119, is that correct?

A That's where I started on them, yes, sir.

Q Then they proceeded to the east, to Milepost 122?

A That is correct.

Q And then they stopped at 122 and it appeared they were picked up there?

A They led straight out onto the highway.

Q Is there anything at Milepost 122, a place to wait, you know, maybe a depression in the ground someplace where people, if they're illegals, can sort of squat down and not be seen from the road?

A Yes, sir, there's a culvert right there.

Q Fine. Now, on the 16th, where did you determine that the aliens were ultimately picked up?

A Apparently on the highway, sir.

Q Okay, at what point in the highway?

A They entered the highway just west of the culvert that goes underneath the highway.

A At Milepost 122, is that correct?

A That's correct.

A Would you assume from that fact that the aliens were going to Milepost 122 as a reconnoitering point or a rendeavous point?

[115] A The two previous times, yes, sir.

Q So you experience suggested to you that they went to Milepost 122 and hid in the culvert—

A (Witness shakes head.)

Q You're shaking your head.

A No, sir, I don't agree with that. I stated before that the aliens entered onto the highway west of the culvert. Not going down into the culvert, and—

Q But you would—okay, you would agree with me that on the previous occasions when you had observed these people or observed traces of these individuals, that on the two previous occasions they apparently rendezvoused with a truck or a vehicle of some nature at Milepost 122.

A Two times. But the one time that I tracked them, which would be on the 4th, I saw the older group with this same type marking, which I didn't have up around Milepost 122, so somewhere between 119 and 122. I didn't—

Q All right. Those tracks were old tracks, though, you indicated.

A They were older type tracks.

Q And I believe you indicated there was rain during that period of time?

A No, sir, I didn't indicate during that period of time, no, not around the 4th. I don't recall.

[116] Q On the first set of old trucks, do you know in fact where they ultimately went up to the highway? Could you tell?

A Which set of tracks, sir?

Q The older tracks that you saw on January the 4th.

A No, sir. Like I said, I didn't follow them. I just observed them from time to time but didn't see them at 122.

Q So that to your personal knowledge you saw the trucks on three occasions. Once you saw a fresh set on January the 4th. On January 4th you saw also an old set, you again saw them January 16th.

A Plus an older group on the 16th.

Q But the two fresher sets, the ones you actually were tracking, both of them led you to Milepost 122 and at that point you lost the tracks and concluded they met a truck or vehicle on the highway, is that correct?

A That is correct.

Q Could you tell which direction the vehicle was heading when it picked them up?

A No, sir. I can't track that well on pavement, sir.

Q All right. Fine. And the vehicle could well have gone on the Casa Grande, could it not, through Sells?

[117] A Yes, sir, I suppose it could have.

Q Appeared the vehicle could have came from Casa Grande, picked the individuals up and returned through Sells, couldn't they?

A Yes, sir, I suppose it could have.

Q And you had no definite information which would have told you that the vehicle which was going to pick up any aliens would have had to have come from Tucson?

A No, sir, I didn't.

Q Now, when you sat out there on the evening of the 31st, you said you did not observe the westbound traffic, or pay much attention to the westbound traffic—I mean eastbound traffic, is that correct?

THE COURT: Let's start again.

Q (By Mr. Rinaldi) All right. I'll backtrack so I don't confuse everybody.

When you went out there January the 31st, were you keeping track of cars coming from the west which had not originally passed you going east? I mean.

THE COURT: Counsel, may I suggest that we take a recess and then maybe at 1:00 o'clock you'll have the question pretty clear in your mind.

MR. RINALDI: I'll write it out in longhand, your Honor.

THE COURT: Thank you, 1:00 o'clock, gentlemen.

[118] (A recess was taken.)

THE COURT: All right, Mr. Rinaldi, please.

Q (By Mr. Rinaldi) Officer, you indicated that you were at Milepost 149 on the evening—or the morning of January the 31, 1977, observing traffic. And you further indicated that the suspected pickup point for the aliens was Milepost 122, is that correct?

A In that area, sir, I didn't specify 122.

Q Well, then would you agree with me that we are talking about a distance of approximately 27 miles away?

A Approximately, yes, sir.

Q And a round trip distance of approximately 54 miles?

A Again approximately, yes, sir.

Q And you had indicated that when you saw the two trucks pass in the morning on January the 31st, 1977, that is the truck which was supposedly driven by Mr. Cortez and the truck which followed that—

THE COURT: What do you mean "supposedly driven by"? The man testified who the people were in the car. Is that what you mean?

MR. RINALDI: Well, supposedly because I don't believe the officer knew at the time the truck went by—

THE COURT: He didn't know who was in the car, but somebody testified who the driver was and who the [119] passenger was.

All right. let's get on now.

Q (By Mr. Rinaldi) You indicated then that after the truck passed, that you were thinking about a time frame when it would probably return if it were involved in alien smuggling activities, is that correct?

A Yes, sir.

Q What kind of time frame were you thinking about or talking about?

A If it passed from our point heading west and then back east, is that correct? Is that what you're saying?

Q Yes.

A Approximately an hour and a half.

Q Okay. Did you assume that it would be possible for them to cover that distance in a shorter period of time?

A Yes, sir.

Q And so what were the parameters—

THE COURT: Parameters?

MR. RINALDI: Is that the wrong term?

THE COURT: The dictionary seems to think that's a mathematical term. Have you looked it up, if you ever tell—

THE WITNESS: No.

MR. RINALDI: No, I haven't.

THE COURT: I can't find it, if your talking [120] about perimeter, but parameter, unless you explained it to me, has a very complicated mathematical meaning. Try it sometime. Try to look it up. See what Mr. Webster says about it.

MR. RINALDI: I will.

THE COURT: I'll agree everybody is using it, particularly newspapermen. I don't know whether there's anything worse than that.

MR. RINALDI: Perhaps that's how I picked up the word, your Honor. Allow me to rephrase the question.

Q What were the limits of the time frame you expected a car would return if it were involved in alien smuggling?

A We expected the vehicle sometime from 2:00 o'clock until the hours just prior to daylight, which at this time was about 6:00 o'clock. As far as being in this pickup area, the pickup point, so this was our time span that we were actually looking for as far as from our point west and then returning east, we allowed approximately an hour and a half.

Q If, well, I don't want to ask you, would you agree with me that had the car come back in slightly less than an hour and half, you still would have suspected it?

A Yes, sir.

Q And in this instance when it came back slightly [121] more than an hour and a half, you expected it also?

A Yes, sir.

Q Now, what period of time are we talking about that this time frame which you felt was a suspicious time frame for a car going down the road and coming back? Would an hour have appeared suspicious to you?

MR. MUELLER: Your Honor, I object, speculative.

THE COURT: Yes, this is all speculative, I wouldn't allow it. The witness is saying the approximate time they figured out was about an hour and a half. Do you have another question?

MR. RINALDI: Yeah, I do.

Q You say the truck was proceeding at approximately 50 to 55 miles an hour, is that correct?

A Appeared to us, yes, sir, at a normal highway speed.

Q Would you agree with me then the truck could have covered the distance between the point you first observed it and the pickup point and returned to the point where you ultimately stopped it within an hour's time if it were driving at 55 miles an hour?

THE COURT: And if it didn't stop, you mean?

Q (By Mr. Rinaldi) That is correct.

A Yes, sir, with no difficulty locating the aliens and getting them right in the pickup, it's possible.

[122] Q Now, with reference to the aliens themselves, this stopping for aliens, isn't it true, Officer, that this whole time the aliens were from—all the evidence you had, the individuals coming up from Mexico were making a definite effort to obscure themselves and to keep from being observed?

A At what point, sir?

Q At all points from their trip from the Mexican border up to the highway. Would you agree with me they were making every effort—

THE COURT: You mean you want him to give his opinion as to what they were doing? You didn't see them, did you?

THE WITNESS: No, sir.

Q (By Mr. Rinaldi) Okay, based upon what you observed, that is the footprints, the fact that in your opinion they started and travelled at night, the fact that when they paralleled the road they did not walk on the road itself but were removed from the road where you indicated they were less likely and perhaps could not be observed by any individuals from the roadway at night. Based upon these observations did it appear to you they were trying to avoid detection?

A Yes, sir, the distance from the highway would—

Q And in your experience, do normally illegal [123] aliens try to avoid detection?

A Yes, sir, they do.

Q And in terms of stopping for the aliens, how much time were we talking about to load six people into a truck? Do you have an estimate or an opinion?

A No, sir, there again it would depend on what kind of traffic would be travelling the highway in that vicinity.

THE COURT: And I suppose how far away they were from the highway?

THE WITNESS: Yes, sir.

THE COURT: And where the car stopped and things like that?

THE WITNESS: Yes, sir, that would be correct generally.

Q (By Mr. Rinaldi) Do you have an estimate as to—

THE COURT: He wasn't there, Counsel. He said that the time an hour and a half was an approximate time that he figured. I think you're wasting time, Counsel. But go ahead and be my guest because I get paid at the end of the month.

Q (By Mr. Rinaldi) Do you have an approximation as to how much time it would take to load those aliens on the truck?

A Under what circumstances, sir? Under one cir-
[124] cumstance if there's no traffic, if they're right there at the highway, it wouldn't hardly take any time at all.

Q I believe you said that the tracks indicated that they were right there at the highway?

THE COURT: No, not they. He's talking about a different they at that time. He has no idea, he said before he didn't see them at all. First time he saw them was when the car was stopped.

Q (By Mr. Rinaldi) So then you have no idea actually how long it would in fact take?

THE COURT: How long in fact it did take?

Q (By Mr. Rinaldi) No, no, I'm asking him—

THE COURT: He said it only took an hour and thirty minutes according to their approximation.

Q MR. RINALDI: All right. And their approximation, what was it based upon, sir? I want to find out how he based that opinion, your Honor.

THE COURT: He's told us, but tell us again.

Q (By Mr. Rinaldi) Please, I'd like to hear it.

A It was based upon the area, general area that they would have to travel to. Also the possibility that the time it would take to exactly locate the aliens. Also we allowed for the fact this is a pretty level highway and pretty straight, therefore a vehicle stopping in the middle of nowhere on this highway would draw suspi-

cions, [125] therefore we didn't reason that this vehicle would stop if there was other traffic. That's why we gave this approximate time of an hour and a half.

Q So that you allowed then a half hour as leeway for them to stop without drawing suspicion, to locate the aliens and to ultimately load the aliens, is that a fair statement?

MR. MUELLER: I object, that could include time of slowing down during traffic, so forth.

THE COURT: Of course it could, Counsel. You're wasting time if you're trying to make an impression on me as to facts; I have time to waste, Counsel, so you be my guest, and eventually I have to approve your fee, don't I?

MR. RINALDI: I'm not sure if you do or not.

THE COURT: I'll make an effort to do it.

Q (By Mr. Rinaldi) Are there paddle markers along the road?

THE COURT: What?

Q (By Mr. Rinaldi) Paddle markers.

A Are you talking about a milepost marker?

Q That is correct.

A Yes.

Q And they're marked at mile increments, is that it?

[126] A Yes.

Q And is there a milepost marker 122 at the culvert?

A Yes, sir, there is.

Q And are those milepost markers clearly visible to vehicular traffic as they go down the road at night?

A Yes, sir, they are.

Q And it's not difficult to locate Milepost 122 at night by the marker, is that correct?

A Not for me it wouldn't be, no, sir.

Q Did you observe the eastbound traffic coming from Sells to Tucson during the hours of 4:00 and 6:00 o'clock in the morning on January the 31st, 1977?

A Yes, sir, we did.

Q And did you make note of all the vehicles that came through?

THE COURT: You mean a written note or mental note?

Q (By Mr. Rinaldi) Written note.

A No, sir.

Q Did you have any idea now as to how many were trucks or how many were vehicles which could have carried aliens?

A Do you mean within the scope of the description we were looking for, sir?

Q Yes.

[127] A None.

Q The only truck that came east on that roadway that could have carried an alien was Mr. Cortez' truck?

A That we were looking for, yes, sir, that's the only one.

Q Were there any other vehicles that could have carried aliens?

A Yes, there was sedans and open bed pickups and if there was other types I didn't really pay any attention, because of the fact that it didn't fit the description we were looking for.

Q And you made no attempt to stop those vehicles or determine whether they contained aliens?

A No, sir, we did not.

Q And correct me if I'm wrong, during this entire period of time it was dark that night, was it not?

A You mean except for the moonlight?

Q Yes.

A Yes, sir.

Q And as the cars went by can you determine how many people are in the back seat of a car?

A No, sir.

Q So in other words a sedan could have gone out there and picked up aliens and brought them right by, you'll never know?

THE COURT: That's what the other lawyer brought [128] out and he agreed.

MR. RINALDI: No further questions, your Honor.

THE COURT: You're talking about the moon, have you any idea what the phase of the moon was at that time and day, time of month? Or do you recall?

THE WITNESS: The best I recall, your Honor, is about half moon.

REDIRECT EXAMINATION

BY MR. MUELLER:

Q You were asked whether you were suspicious of the linen trucks that went from the east to the west. You said you weren't. Would you tell us why you wouldn't be?

A Well, sir, these are company trucks, and I assumed that they had to meet deadlines and also have their regular routes to where—as far as coming and picking up, using them for smuggling aliens, we didn't assume—we assumed that this was no way, unless the whole company would be involved.

Q You were asked questions regarding the traffic out of the Altar Valley and how you could see it from where you were located. Would you tell us what means you would have of detecting traffic out of that area and if you did at all?

[129] A Yes, sir. I testified before we do have a sensor field down in the Altar Valley which will let us know of certain activities in the Altar Valley, in the southern part of it.

Q How are you informed of any activity of that type? Sensor activity, I mean.

A It gives a signal to the Tucson office here and the radio operator then calls it out to the respective units.

Q Did you get any that night, do you recall?

A Yes, sir, we did. I don't recall the numbers. It was at that point we weren't interested in it until we got a further backup with more sensor hits.

Q And you didn't get those, apparently?

A No, sir, we didn't.

Q Did you make any traffic checks on that highway coming out of the Altar Valley?

A We saw a pickup, at that time we didn't know it was a pickup, but we saw a vehicle coming out of the Sasabe area while we were sitting up there. We just drove over onto the filling station down there at Three Points and observed it as it went by. Officer Evans recognized it as being from the general locality, so we didn't even stop it.

Q Mr. Velasco asked you about the tracks going from the cattle guard to the Tucson area. Do you know if [130] the tracks went between those two points?

A Not the tracks that I tracked, sir. Little Tucson is south of Highway 86, and these did not go south to Little Tucson.

Q Did they—they came from the south, though, didn't they?

A Yes, sir, from a point west of Little Tucson.

Q Is Little Tucson shown on that map?

A Yes, sir.

Q How far is the path you're familiar with from Little Tucson?

A That path I'm familiar with, sir, is approximately three to five miles west and north.

Q What is the nature of the—or would you describe the habitation along the highway from Milepost 149 west to 122?

A Very little, sir. Approximately Milepost 121 there's a couple of houses sitting on the north side of the highway right close, but it's very limited, very little housing.

Q Do you know of any others along that stretch of highway?

A No, sir, I don't.

Q How many vehicles did you stop that morning between 1:00 o'clock and 6:15?

[131] A One, sir.

Q Which one was that?

A Mr. Cortez' pickup.

MR. MUELLER: That's all I have, your Honor.

THE COURT: Any recross?

MR. VELASCO: No, your Honor.

THE COURT: Thank you.

MR. MUELLER: Call Agent Evans in next, your Honor.

RONALD EVANS,

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. MUELLER:

Q State your name, please.

A Ronald C. Evans.

Q And your occupation is?

A U.S. Border Patrol agent.

Q How long have you been with the Border Patrol?

A About two years and four months.

Q Have you had any prior law enforcement experience?

A Yes, sir, I have.

Q What was it, briefly?

[132] A I was a city policeman in Ohio for three years and deputy sheriff for continuing three years, total of six prior.

Q How long have you been stationed in the Tucson area?

A Since November '74 I came on duty.

Q That's your entire experience with Border Patrol?

A Yes, sir.

Q And during the early morning hours of January 31, 1977, were you on duty?

A Yes, sir, I was.

Q Where were you located from say 1:00 o'clock until 6:15?

A I was located at a point with my partner, Agent Gray, at approximately Milepost 149 on Highway 86. It would be just west of Three Points.

THE COURT: Did you say 1:00 a.m. or 1:00 p.m.?

THE WITNESS: He said from 1:00 a.m. area.

MR. MUELLER: To 6:15.

THE COURT: Thank you.

Q (By Mr. Mueller) Was a—did you observe any vehicles going from the east to the west while you were there?

A Yes, sir, we did.

Q Were there any that you made special notice of?

[133] A Yes, sir, two.

Q Would you describe those two to the best of your recollection?

A The first one that we were concerned with came past about 4:30 in the morning. That was a greenish-yellowish what I described it as a pickup truck with a camper cap and then about fifteen minutes after that another pickup went by with a large, I would say, a wooden homemade type camper thing on the back.

Q Do you recall the color of those?

A No, sir, I don't.

Q How do you recall the color of the first one?

A I was standing there watching it at the road.

Q Wasn't it dark?

A Yes.

Q Was there any light?

A There was some moonlight, yes.

Q Were you closer to the vehicle than your partner?

A Yes, I was.

Q Did you pay attention to the license number?

A No, sir. We had that pre-arranged how we would handle that.

Q How is that.

A I took it upon my duties to get the description of the vehicle as best I could and my partner was to try [134] to get a license number.

Q And did you later stop a vehicle?

A Yes, sir we did.

Q Did it compare to either of these two?

A Yes, sir, it was the one we believed to be the first vehicle that went east that, the one about 4:30 in the morning.

Q The one you described as what color?

A It was a greenish-yellow with a camper cap.

Q After this vehicle was stopped, do you recall what you did?

A Yes, sir. Well, we—you mean after he was stopped?

Q Yes.

A After he was stopped—my partner was driving our vehicle, he exited ours, I got out—

Q Okay, what did you do?

A I just got out of the right-hand side to more or less oversee the situation and to protect my partner while he handled the situation.

Q Did you draw any weapons of any kind?

A No, sir. I had a shotgun.

Q Where was it?

A The shotgun, I had it about like a port arms. I was standing right behind the right passenger door of [135] our vehicle.

Q Were the lights to your vehicle shining on the other one?

A Yes, sir.

Q Were any lights shining back at you?

A Any lights shining back at us?

Q At you.

A No.

Q In other words, were you in any light of any kind?

A No, I was more or less in the darkness.

Q Okay. Then tell us what did you do?

A Okay, I, my partner—

Q Just tell me what you did. Try to limit, if you have to refer to what he did, please limit it.

A Okay, after my partner finished his conversation with the driver, I approached the passenger side of the truck that we had stopped and found a subject sitting in the right front seat.

Q What did you do with regard to that person?

A I knocked on the side window and he just set there looking straight out the windshield and finally opened the door and said, "Good morning, U.S. Border Patrol," and he just sat there looking, and I asked him his citizenship and he finally looked at me and said to me [136] he was illegal, or a citizen of Mexico, and I asked him to come out of the truck.

Q Before you went up there to the passenger side did you see the rear door of the camper open?

A Yes.

Q Did you notice if anyone was in there?

A Yes, sir.

Q What did you notice?

A Six illegal aliens.

Q After you talked to the man in the passenger side, did he make a declaration of alienage, citizenship?

A Yes, he admitted he was a citizen of Mexico.

Q Did you do anything else or talk to him about anything else?

A No, we just went, we moved to the rear of the vehicle area where my partner had the driver of the truck and advised the subjects of their rights.

Q Did you check any shoes or anything?

A Yes, sir, he had a bag—well, when we got out, he had a bag he was sitting there, had between his legs and it was a canvas-type satchel, I believe, that had clothes in it.

Q Did you check shoes?

A Yes, sir.

Q What he might have been wearing, where were you [137] when you did that?

A I was right at the side of the pickup truck.

Q How did you do that?

A Okay, my partner asked me, requested me that I check the shoe soles. I had him raise his feet up and I looked at the chevron design and we knew that was the man we were looking for.

Q I'd like to have you see Government's Exhibit 1. It's right in front of you there. It's a photograph. Do you recognize what's shown in that photograph?

A Yes, sir, I do.

Q What is it?

A It's the same shoes as the one subject was wearing that morning, the chevron design.

Q Did you have occasion to check the contents of the bag you spoke about?

A Yes, sir, I did.

Q What did you find in that?

A I found a jacket, a change of clothes, and a flashlight.

Q Any batteries?

A I honestly don't remember if there was batteries.

Q Fine. Was the flashlight in working order?

A Yes, sir, it was.

MR. MUELLER: Thank you, that's all I have.

[138] THE COURT: Cross.

CROSS EXAMINATION

BY MR. VELASCO

Q Before you stopped the vehicle could you see the chevron shoes or the flashlight?

A Excuse me, sir?

Q Before you stopped the vehicle could you see the shoes or flashlight?

A Before we stopped it?

Q You had never seen it before?

A The chevron shoes?

Q Yes.

A I had never seen them myself.

Q And the same thing for the flashlight?

A Not before we stopped it.

MR. VELASCO: I have no other questions.

CROSS EXAMINATION

BY MR. RINALDI:

Q When the vehicle—when the first vehicle which you suspected passed your observation post at 4:30 on January 31, 1977, you indicated that the vehicle was greenish-yellow, is that correct?

A I believe that's what it was at the time.

[139] Q Was there anything outstanding or unusual about the camper on the back of the vehicle?

A No, sir, not at the time.

Q Did it have a corregated finish or was it level finished, do you recall any of the details?

A Due to the darkness I couldn't recall, I just knew it was a camper type cab.

Q Did it have windows on the side you observed?

A Yes.

Q And that it had a window in the back?

A I don't recall that, I don't remember seeing that. I just knew it was a camper.

Q Later, though, when you saw it the second time, you did observe it had a window in the back?

A Yes, sir.

Q Approximately how far were you from the roadway when you observed the vehicle?

A Well, I was right at the side of our cruiser, or our vehicle, and it was maybe no more than a hundred feet off the road, I don't think it was even that.

Q And you indicated to me that you were closer to it then your partner?

A I haven't indicated that to you, sir.

Q Well, were you closer than Mr. Gray?

A To our vehicle.

[140] Q Were you closer to the vehicle which you were observing?

A No, my partner was out near the road.

Q When you said you were closer to the vehicle, you meant you were closer to your own vehicle?

A Yes, sir.

THE COURT: What kind of a vehicle were you close to? You said it was a cruiser?

THE WITNESS: I commented it's a cruiser. We were in a Dodge Ram Charger.

THE COURT: A Dodge?

THE WITNESS: Ram Charger.

THE COURT: Was it marked?

THE WITNESS: Yes, sir.

Q (By Mr. Rinaldi) When your partner returned after the vehicle had passed, did you have a conversation with him?

A Passed east or west?

Q Passed going to the west, the first time you saw it?

A Yes, sir.

Q At that time did he indicate to you whether he had seen the license or not?

A Yes, sir, he did.

Q What did he indicate to you?

[141] A He said, "Well, all I could get was GN88."

Q GN what?

A GN88.

Q Now, at 6:15 when the vehicle came back, do you know for a fact whether that was the same vehicle which you had seen an hour and 45 minutes earlier?

A Well, it came back a little prior to 6:15, but there was no doubt in our minds it was the same one.

Q Do you know if it was in fact the same vehicle in question?

A I don't think I could correctly answer that. That was—when it passed we pulled out behind it and there was no doubt in my mind because I had the description of it.

Q Okay. Now, after you stopped the car or the truck and pulled it over to the side of the road, I believe you indicated that the driver of the truck came out and walked to the back of the truck.

A Yes, sir, he did.

Q And your partner was driving your patrol vehicle at the time?

A Yes, sir.

Q And your—

THE COURT: At the time the other man walked back?

Q (By Mr. Rinaldi) At the time you stopped the [142] vehicle was your partner driving the patrol vehicle?

A Yes, sir.

Q And you were riding in the passenger side?

A Yes, sir, I was.

Q Okay. Now, your partner got out of the car and walked forward to the back of the truck, is that correct?

A Yeah. Well, it was in-between our vehicle and the truck.

Q How far did your vehicle stop behind the truck?

A No more than a carlength I wouldn't believe.

Q Now, you remained behind the right front door, is that it?

A Yes, sir, with the door open and outside of the vehicle.

Q And what occurred between your partner and the driver? Did they subsequently meet behind the truck?

A Yes, sir.

Q And they met somewhere between your car and the back of the truck?

A Yeah, it was more or less probably right at the back of the truck or just a little bit behind it.

Q And can you relate to us what happened then?

A Well, I knew what my partner said.

Q What did he say?

A He said, "Good morning." He said, "U.S. Border [143] Patrol. How are You?" Something like that. Or just about that same words, and—

Q Did you hear a response?

A Yeah—he didn't say anything. He just started quiverring. And I know Wayne—and I know Agent Gray asked him, "Are you a citizen of the United States, sir?" And I remember him saying yes.

Q He responded that he was?

A Yes.

Q Did your partner ask him for any identification?

A No, not at the time.

Q Is it standard operating procedure to ask for papers when someone indicates they're a citizen or do you just take them on their word?

A No, we more or less take them on their word.

Q So if you stop somebody and he says, "I'm a citizen," you don't question them any further in reference to citizenship?

A If we would have reason to believe he would be lying to us.

Q What happened next?

A There was some words exchanged and what they were exactly between the driver and my partner I don't know. He just reached over and opened up, it's a half window-type thing on the camper, he just reached, opened that up.

[144] Q Who reached over?

A The driver.

Q And you say that there were some words exchanged between your partner and the driver, but you don't know what they were?

A No, I don't.

Q Do you have any idea what the conversation related to or did you hear who initiated it?

A I would assume it was my partner—

THE COURT: No, I think the lawyer wants to know whether you heard it so you could tell us what it was. You don't want him to assume what it was?

MR. RINALDI: I don't really mind.

THE COURT: All right, he wants you to tell what you assume happened.

THE WITNESS: Well, I assumed normal procedure when we would stop a vehicle, we would ask them if they have any passengers with them.

Q (By Mr. Rinaldi) And then what?

A And normally a driver would say yes or no or whatever.

Q And if they indicate they do have passengers, what's the next procedure?

A You would normally talk to them, determine if they're aliens.

[145] Q Under what circumstances would you look into the back of a truck?

THE COURT: This man or the other man?

Q (By Mr. Rinaldi) Under normal operating procedures.

THE COURT: This man or the other man?

MR. RINALDI: This man.

THE COURT: Well, he hasn't said he did. This man said he was standing by his truck.

Q (By Mr. Rinaldi) So in other words you heard the first part of his conversation when he asked him what alienage he was and after that you couldn't hear any more of the conversation?

A No, I couldn't hear exactly what it was.

Q And you don't know whether your partner ordered the driver to open the—

THE COURT: Am I going to hear testimony on that, Counsel? Because the other driver said no, it was the other man who ordered.

MR. RINALDI: I believe you will.

THE COURT: Will I?

Q (By Mr. Rinaldi) You don't know whether the driver was ordered to open the truck or whether—the rear of the truck—or whether he did it of his own volition?

A No, sir.

[146] THE COURT: That's all, gentlemen?

MR. MUELLER: I have a couple.

REDIRECT EXAMINATION

BY MR. MUELLER:

Q Did Agent Gray at any time remove his revolver from its holster?

A No, sir.

Q Was he carrying any weapon other than that?

A No, sir.

Q Is this the only vehicle that you and he stopped that morning?

A No, we—Yeah, that was the only one.

MR. MUELLER: That's all I have.

THE COURT: Will you tell me what a Dodge Ram Charger looks like? I haven't the vaguest idea. Am I using the right term, Ram? Does it look like a—

THE WITNESS: Looks like a Chevrolet Blazer, four-wheel drive, like a pickup truck without the small cab, it's a continued-type top.

THE COURT: Was that parked vertical to the road, parallel to the road?

THE WITNESS: Vertical.

THE COURT: How far was the front of the car from the roadbed?

[147] THE WITNESS: Within a hundred feet, your Honor, sitting right on the cattle guard.

THE COURT: Was it a marked automobile?

THE WITNESS: Yes, sir.

THE COURT: And by marked you mean it had the color blue and then it was red lights on it?

THE WITNESS: We have the standard Border Patrol color, white top with the green main body, decals of U.S. Border Patrol on each door, siren and red lights.

THE COURT: What is your recollection that the phase of the moon was in that night?

THE WITNESS: I believe it was somewhere around half to three-quarters.

THE COURT: Thank you, You may step down, sir.

Are there any other questions?

MR. MUELLER: No, your Honor.

THE COURT: Thank you.

MR. RINALDI: Just one other question.

RECROSS EXAMINATION

BY MR. RINALDI:

Q Was it a cloudy night night night?

A No.

Q I believe it had been raining the night before?

A Yes, sir, three nights before.

[148] Q But the clouds had all cleared by then?

A As near as I can recall.

Q And they didn't obscure the moon?

A No.

Q One final thing. With reference to the vehicle, it was parked a hundred feet off the road.

A Our vehicle?

Q Yes.

A Within a hundred feet or right in that area.

Q Was there a reason for that?

Q Yes, sir, so we could observe two different locations, we could observe traffic passing by on 86 and also we could see a vehicle leaving Altar Valley.

MR. MUELLER: I'm sorry, he didn't get a chance to finish his answer.

THE WITNESS: So we could notice any vehicles that could possibly come from Sasabe area on Sasabe Highway, we can see the headlights.

Q (By Mr. Rinaldi) Was it clearly visible from Highway 86?

A Yes.

MR. RINALDI: Thank you, sir.

THE COURT: All right, Sir, thank you.

MR. MUELLER: With that the Government rests, your Honor.

[149] THE COURT: Any witnesses, gentleman?

MR. VELASCO, do you want to call a witness?

MR. VELASCO: Yes, your Honor.

Call the defendant Mr. Pedro Hernandez-Loera.

PEDRO HERNANDEZ-LOERA

having been first duly sworn, testified on his oath through the interpreter as follows:

DIRECT EXAMINATION

BY MR. VELASCO:

Q Mr. Hernandez, you are the defendant in this case, are you not?

A Yes.

THE COURT: Excuse me, can you speak English?

THE WITNESS: No.

THE COURT: A little, maybe?

THE WITNESS: No.

Q (By Mr. Velasco) On the night of January 31, 1977, the vehicle that picked you up, what was its direction of travel?

A In relation to where the sun comes out or sets?

Q Yes.

A It came from where the sun sets to where the sun rises.

[150] Q Did you ever see that truck or vehicle travel from east to west.

A No.

MR. VELASCO: No further questions, your Honor.

CROSS EXAMINATION

BY MR. MUELLER:

Q For what distance did you see the truck travel before you—during the time that you saw this vehicle that picked you up, how much distance did you watch it?

A I couldn't tell you.

Q Did you just see it very briefly before you got in?

A How's that?

Q Did you see it just for a short period of time before you got into it?

A Very little, only while it arrived.

MR. MUELLER: That's all. Thank you.

THE COURT: I must confess, gentleman, I haven't the vaguest idea what transpired. I'm sorry, Mr. Velasco, I didn't understand your questions or the answers of the witness, nor when Mr. Mueller asked questions. I don't need your help now, Mr. Rinaldi.

MR. RINALDI: I wanted to ask him some questions.

THE COURT: You may when I finish.

[151] May I ask, Mr. Velasco, did you ask him to describe what direction the car that stopped him was going?

MR. VELASCO: No, your Honor, the vehicle which picked him up. I asked him the direction of travel.

THE COURT: Maybe that's what confused me, the vehicle that picked him up, there's been no testimony that he was picked up by any vehicle, the only vehicle I heard was that he was found in a vehicle.

MR. VELASCO: Well, let me clarify that.

REDIRECT EXAMINATION

BY MR. VELASCO:

Q Were you, Mr. Hernandez, picked up by a vehicle on what is called the Sells Highway?

A Yes.

Q What kind of vehicle was it?

A A pickup.

Q And this pickup, in what direction was it travelling?

A From east to west.

Q And that's the direction it picked you up?

A The truck was coming from the east to the west.

Q And you're saying that it was coming from the direction where the sun rises to where the sun sets?

A It was coming from where the sun sets to where [152] the sun rises.

Q The vehicle that picked you up, did it ever change direction of travel?

MR. MUELLER: I object to the form of the question as to time frame.

THE COURT: You mean after he picked him up.

MR. VELASCO: Let me rephrase it.

Q From the time you first observed the vehicle, did it ever change directions?

A No, it continued in the same direction.

MR. VELASCO: I have no other questions.

THE COURT: Cross?

RECROSS EXAMINATION

BY MR. MUELLER:

Q You only saw this truck, pickup truck, a few seconds before you got into it, is that correct?

A Yes.

MR. MUELLER: That's all I have.

THE COURT: Mr. Rinaldi?

CROSS EXAMINATION

BY MR. RINALDI:

Q Is this the same truck you were arrested in?

A Yes.

[153] THE COURT: Thank you, sir.

That's all, gentleman?

MR. RINALDI: I'd like to call the defendant, Mr. Cortez.

THE COURT: All right.

JESUS CORTEZ-ESPINOZA

having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. RINALDI:

Q Were you driving your—do you own a truck?

A Yes.

THE COURT: Excuse me, do you speak English?

THE WITNESS: Yes, sir.

THE COURT: You write English quite well?

THE WITNESS: Yes.

THE COURT: Is this your handwriting on this form here?

THE WITNESS: No.

THE COURT: It's not your handwriting. This is not your signature, is it?

THE WITNESS: Yes.

THE COURT: The signature is yours, and the [154] date, is that yours, too?

THE WITNESS: Yes.

THE COURT: Do you speak English quite well or just a little bit?

THE WITNESS: Little bit, sometimes I can understand.

THE COURT: Well, we will try him in English first, and if he has difficulty ask the lady to help him.

MR. RINALDI: Fine.

THE COURT: How long have you been a resident here in the United States?

THE WITNESS: About twelve years.

THE COURT: Shall we try it?

MR. RINALDI: Sure.

THE COURT: Just for size?

Q (By Mr. Rinaldi) Do you own a vehicle?

THE INTERP: Excuse me, your Honor, may I go back and translate for the other defendant?

THE COURT: Maybe Mr. Valesco will do that, we're doubling in brass.

Q (By Mr. Rinaldi) Do you own a vehicle?

A Yes, sir.

Q What kind of a vehicle?

A 1973 pickup, Chevy.

Q Did you drive your vehicle on Highway 86 on [155] January the 31st, 1977?

A Yes, sir.

Q Would you describe for the Court where you were coming from that night? Prior—were you arrested at any time during that evening?

A I was coming from Casa Grande.

Q And before that?

A From Phoenix.

Q And after leaving Phoenix, what route did you take?

A I took that 10, Freeway Ten, to Case Grande.

Q And from Casa Grande which way did you go?

A I don't know what's the number here, little road, but I can show you on the map.

THE COURT: He can show you the map, but he doesn't know the number of the road he says.

Q (By Mr. Rinaldi) Fine, I didn't hear his response.

Would you tell me on the map approximately where the road goes?

A Across.

THE COURT: That's not a good map I don't think.

Q (By Mr. Rinaldi) Casa Grande would be—

A This is Sells, right?

Q Yes.

[156] A There's a little corner, where we find the road to go to Ajo, this is the road to go to the mines, the mine, I don't know the name of the mine here between Casa Grande and—

Q Would it be this one right here that's marked 98? Milepost 98? Pojeto?

A I believe it is.

Q So you drove to Casa Grande and then drove from Casa Grande on a small road down to Highway 86?

A Yes, sir.

Q And you came to Highway 86 just to the west of Sells?

A Yes, sir.

Q After you reached Highway 86, which direction did you turn?

A Well, the way to go to Sells.

Q Okay, would that have been to the left or to the right?

A The left.

Q And then after you turned to the left did you pass through Sells?

A Yes, sir.

Q And ultimately did you meet Mr. Hernandez-Loera, or pick up Mr. Hernandez-Loera that evening?

A This was after Selis, on the way to Tucson.

[157] Q About how many miles would that have been to the east—that would have been to the east of Sells, is that correct?

A Yes.

Q About how many miles east of Sells?

A It's about five or six miles, seven, somewheres.

Q After you picked up Mr. Loera did you proceed on toward Tucson?

A Yes.

Q Were you stopped by the police? Or by the Border Patrol that evening? That morning?

A If I stopped?

Q Well, did the Border Patrol stop you?

A Yes.

Q Had you ever passed from Tucson west to Sells?

A No, sir.

Q That morning?

A No, sir.

Q After you were stopped, did you get out of your truck?

A Yes, sir.

Q Would you tell me what happened?

A Well, he told me there was a Border Patrol officer, then I took my driver's license out. He asked me if I was a citizen, I said, "Yes, I am."

[158] Q Did you show him your driver's license?

A Yes, sir.

Q Then what happened?

A And then he told me, "What do you have in your camper?" And I said, "Well, I want to tell you the truth, there was this man hijacking, and this other man's came,

came out of the bushes, and they went in the truck, in the pickup, in the back of my pickup, in the camper."

Q Did he ask permission to look in the truck?

A He told me to open the camper.

Q And did you open it?

A Yes.

MR. RINALDI: No further questions, your Honor.

CROSS EXAMINATION

BY MR. MUELLER:

Q You say you told him you were a citizen of the United States?

A Yes, sir.

Q You're not, are you?

A No, I am immigrant.

Q I can't hear you.

THE INTERP: I am an immigrant, he said.

Q (By Mr. Mueller) Why were you lying to him then?

A Well, I was, I thought it was Highway Patrol.

[159] Q You lie to the Highway Patrol but not to Immigration?

A No, no, I thought it was Highway Patrol at first and I took my driver's license.

Q Why did you tell him—

A After that when he asked me, when he told me, when he told me he was a Border Patrol, after that he didn't ask me no more nothing, just put me in.

Q You didn't volunteer the fact you were an immigrant?

A No, I lied, I say I am an American citizen.

Q What kind of card do you have, green card, resident alien card?

(Explained by interpreter.)

A The green card, resident alien.

Q Do you have it with you?

A Yes.

Q Could I see it?

MR. MUELLER: May I see it, Your Honor, Does the Court want to see it?

THE COURT: Better mark it then or something.

MR. MUELLER: I didn't want to put it in evidence.

THE COURT: If you don't want to put it in evidence, I don't want to look at it.

[160] MR. MUELLER: I didn't want to take it from him.

Q What kind of a—what's the color of your truck, this '73 Chevy pickup?

A It's green.

Q What color green? What shade green?

A It's more dark than light.

Q More?

THE INTERP: More dark than light, he said.

Q (By Mr. Mueller) Is it as green as Mr. Hernandez' shirt here?

A No. It would be lighter than that.

Q Is it as green as this man's jacket here?

A No.

Q Lighter than that?

A No, darker than that.

MR. RINALDI: I object, I don't think the man's jacket is green.

THE COURT: Terrible to hold your mouth.

Q (By Mr. Mueller) Do you know the license number of your truck?

A I don't remember. I know the number is 8804.

Q Are the first two letters CN?

A I believe it is.

MR. MUELLER: That's all I have, your Honor.

THE COURT: Anybody else?

[161] MR. VELASCO: I have no questions.

MR. RINALDI: Nothing, your Honor.

THE COURT: I'm afraid I didn't hear you when you were asked by your lawyer about who was in the camper. Was there anybody in the camper?

THE WITNESS: When they stopped me? When the Border Patrol—

THE COURT: On the night or morning of January 31st of this year when you were stopped, yes.

THE WITNESS: Yes, sir, there was, there was some mens in there.

THE COURT: There were some what?

THE WITNESS: Some people in there.

THE COURT: Some people in the car?

THE WITNESS: In the camper.

THE COURT: How did you say they got in? Or did you say?

THE WITNESS: When I stopped to pick up Loera, Mr. Hernandez, and these other mens came from the bushes, from the small trees, and they don't even ask me if I give them a ride.

THE COURT: They came from the bushes?

THE WITNESS: Yes, sir, at the side of the road.

THE COURT: And why did you say—what did you say to Mr. Hernandez about that?

[162] THE WITNESS: When I stopped for him he was asking for a ride, you know.

THE COURT: Yes, I understand, he was just a pickup, you didn't know him at all.

THE WITNESS: Mr. Hernandez.

THE COURT: Who are you talking about? Aren't you talking about Hernandez?

THE WITNESS: Yes.

THE COURT: That's the man I'm talking about.

THE WITNESS: I stopped to pick up him.

THE COURT: Did you know him, I said. Did you know him beforehand or was he just a hitchhicker?

THE WITNESS: Yes, I know him before.

THE COURT: Oh, you know him before?

THE WITNESS: Yes, just once.

THE COURT: And this was late at night, was it?

THE WITNESS: No, no, there was, I think it was before Christmas I went to Nogales.

THE COURT: No, that's when you knew him once before?

THE WITNESS: Yes.

THE COURT: But I mean on this day when you picked him up was that late at night when you picked him up?

THE WITNESS: It was 5:30 o'clock in the morning. [163] I'm not sure.

THE COURT: Did you have an appointment with him?

THE WITNESS: He called me the afternoon that if I can do a favor for him and I said, "What do you want?" You come back—

MR. RINALDI: Your Honor, with all due respect, I'm not sure what this has to do with anything in this case.

THE COURT: Well, you can—if you want to make that an objection—do you?

MR. RINALDI: Yes.

THE COURT: We'll record it, yes.

MR. RINALDI: I mean I think he has a limited right to testify to those matters relevant to the matters before the Court.

THE COURT: You didn't say that when you asked him to testify, you didn't tell me you were offering him only for a certain amount of time or purpose, did you?

MR. RINALDI: I think the motion speaks for itself, your Honor.

THE COURT: I said you didn't tell me it was only offered for a limited purpose. You did say these men came

into his car without his permission and unknown to him as to why they were there. So I'm inquiring now about all of those. But you may record your objections which I think you had already.

[164] MR. RINALDI: Well, my position is basically—

THE COURT: We understand what your position is.

MR. RINALDI: That his testimony can't be used against him.

THE COURT: I know it can't be and that's because the Supreme Court said it couldn't.

MR. RINALDI: What I'm curious to know is is Mr. Mueller presenting it or is the Court?

THE COURT: I don't want to argue with you now, shut up.

MR. RINALDI: Thank you, your Honor.

THE COURT: Now, you were telling me about this man called you sometime in the afternoon to do him a favor.

THE WITNESS: Yes, sir.

THE COURT: What favor did he ask?

THE WITNESS: Just to pick up him.

THE COURT: Pick him up?

THE WITNESS: Yes, sir.

THE COURT: Did he tell you where?

THE WITNESS: He told me just by Sells, I don't know. He didn't tell me the right direction.

THE COURT: And you left from Phoenix to pick him up?

THE WITNESS: No, no, not just for him. My wife and I went to a dance last—the night before, and [165] we went home and we started, you know, arguments with the man, she went to bed and I took my truck and I went, I went out of the house, and I was going to go to Nogales, then I remembered that he was called me, he called me, so, well, I can take him back over to Nogales. Because it's the way I was going.

THE COURT: And that's how you found him?

THE WITNESS: Yes, sir.

THE COURT: Now, my question was, did you tell him when he got in the car about these men that had got in the back of the car?

THE WITNESS: Did I tell him?

THE COURT: That was the question I asked, yes.

THE WITNESS: No, he didn't tell me nothing. The mens came out of the bushes.

THE COURT: Yes, but did you tell him you knew some men got out of the bushes and got into the camper, did you tell him that?

THE CLERK: Yes.

THE COURT: What did he say?

THE WITNESS: If I can give him a ride, and I say, "Well, they're in the truck already." I was kind of scared, too, I don't know how many mens were in there.

THE COURT: How long were they in the truck before you were stopped by the government?

[166] THE WITNESS: It was—it was not too far, I don't remember, I believe about ten, eight or ten, fifteen miles, when he stopped me.

THE COURT: You had never seen them before, I guess?

THE WITNESS: No, sir.

THE COURT: All right. Anybody else?

MR. MUELLER: No, your Honor.

MR. VELASCO: No, your Honor.

THE COURT: Thank you, sir, you may step down.

Anybody else? Do you rest your case, Mr. Velasco?

MR. VELASCO: Yes, sir, I rest my case.

THE COURT: Mr. Rinaldi, do you rest?

MR. RINALDI: Yes, I rest.

THE COURT: Any rebuttal? Motion denied, exception.

MR. VELASCO: May we be excused, your Honor?
THE COURT: Thank you, yes.
MR. RINALDI: Thank, you, your Honor.

* * * * *

CERTIFICATE

STATE OF ARIZONA

COUNTY OF PIMA

I, DAVID W. HANDY, hereby certify that I am an official court reporter in the United States District Court for the District of Arizona, and that as such reporter I attended the proceedings in the foregoing-entitled cause and took down in shorthand all proceedings had and testimony addressed; that the same was reduced to writing under my direction and that the foregoing 166 typewritten pages contain a true and correct transcript of my shorthand notes as taken.

IN WITNESS WHEREOF I hereto set my hand this 1st day of June, 1977.

/s/ _____
DAVID W. HANDY
Official Court Reporter

Supreme Court of the United States

No. 79-404

UNITED STATES, PETITIONER,

v.

JESUS E. CORTEZ AND
PEDRO HERNANDEZ-LOERA

ORDER ALLOWING CERTIORARI. Filed June 9, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

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